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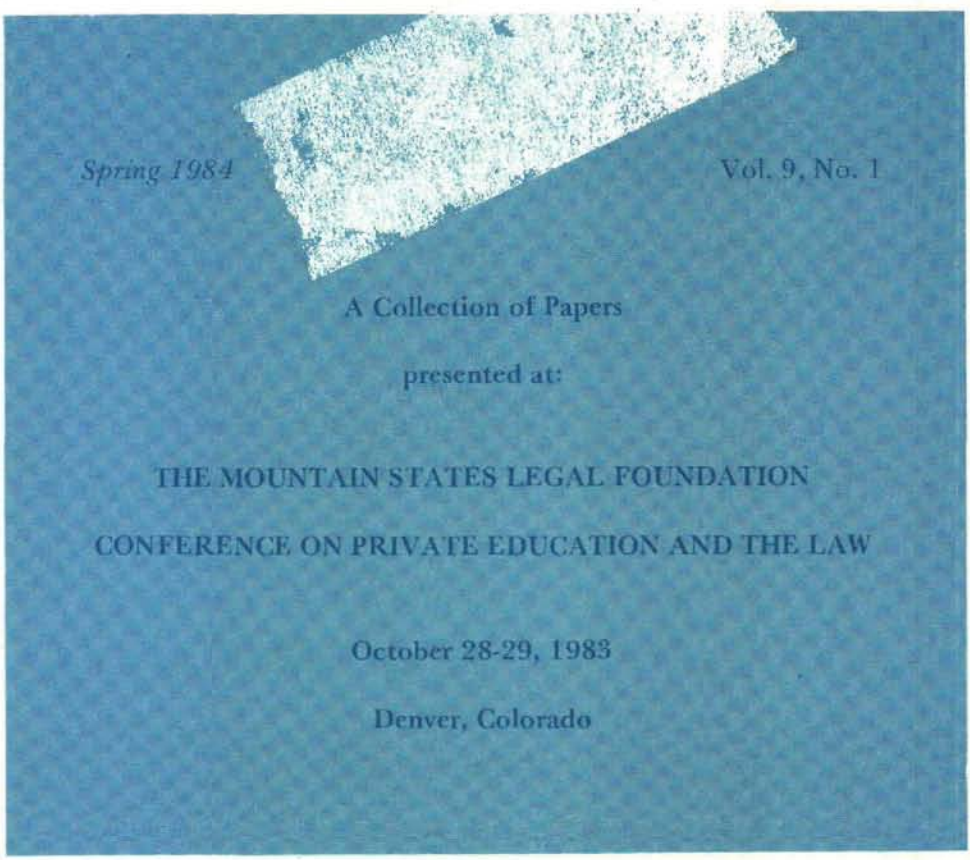

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THE JOURNAL OF
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Vol. 9 No. 1

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PREFACE

This issue of *The Journal of Social, Political and Economic Studies* presents the proceedings of the Conference on Private Education and the Law held on October 28-29, 1983, in Denver. The Conference was sponsored by Mountain States Legal Foundation (MSLF), a nonprofit, public interest law firm which advocates private enterprise, private property rights, limited government, and individual economic liberty in the judicial arena.

MSLF has for the past four years defended the independence and vitality of private educational alternatives. For example, MSLF represented the American Association of Presidents of Independent Colleges and Universites since 1979 as a "friend of the court" in *Grove City College v. Bell*, a case decided by the United States Supreme Court as this issue was going to press. In *Grove City*, MSLF argued that acceptance of individual federal financial aid by a college's students should not subject all of the school's programs to extensive federal regulation. The Supreme Court agreed, but also held that such aid to students makes a college a "recipient" of federal funds, and subjects the specific program (in this case, financial aid) to federal regulation.

Similarly, in *Mueller v. Allen*, the Foundation filed a brief in defense of tuition tax relief for private school parents. MSLF, representing itself, the National Taxpayers Union, and a minority group organization committed to private educational alternatives, argued that private education provides quality opportunities for millions of Americans, and is particularly important for minority students in urban areas where existing public schools are often inadequate. The Supreme Court upheld the constitutionality of tuition tax relief, allowing states to reduce tax burdens and make private education a more affordable alternative. The implications of both the *Grove City* and *Mueller* cases are discussed at length in this issue.

The purpose of the Conference was to focus attention on the contemporary re-analysis of America's educational system. A central issue in this great debate is the role of private schools in American education. The private sector is increasingly being

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called upon to provide meaningful educational opportunities. Yet resources to fully provide or exploit such opportunities are diminishing while government regulation of further private sector educational alternatives is increasing. The viability and integrity of the private educational system in America will depend to a large extent on successfully challenging legal obstacles placed in its path.

In light of its mission, the objectives of the Conference were three-fold:

1) to analyze recent and pending cases in the federal courts and their impact on private schools;
2) to investigate and evaluate the education agenda of the Reagan administration; and
3) to anticipate and develop a sound strategy for future issues that will face the private educational community.

The roster of speakers addressing these topics included informed and prominent educators, lawyers, and policy-makers. The proceedings are published with the hope that the issues confronted at the Conference will be further discussed and debated, in view of the profound consequences which their resolution will have in the important area of education.

The editors wish to express their gratitude to the *Journal* for making its outstanding forum for the exchange of ideas available; to the participants at the Conference for their thoughtful contributions; and to the MSLF support staff, particularly Brenda Vestal and June Eisenman, for their efforts in producing the Conference proceedings.

Clint Bolick
Maxwell A. Miller

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CAN EDUCATION SURVIVE THE "NEW EQUALITY"?

By Maxwell A. Miller

On behalf of Mountain States Legal Foundation, it is my pleasure to welcome you to "Private Education and the Law." We are sponsoring this seminar to acquaint educators, lawyers, administrators, legislators, and citizens about the impact the law is having upon education, particularly private education as a viable alternative to public education.

If there is a traceable genesis for this conference, it stems from the litigation in which we have been involved over the years. Mountain States Legal Foundation is a public interest law firm whose primary role is to litigate legal issues impacting public policy. In that capacity we represented the American Association of Presidents of Independent Colleges and Universities in a friend of the court brief filed in *Grove City College v. Bell*, now pending before the United States Supreme Court. We argued in *Grove City* that colleges which do not *directly* receive government funds cannot be regulated as are recipients. Last year in *Mueller v. Allen*, we represented the same association and other taxpayer groups in arguing, again as a friend of the court, that tuition tax credits are not necessarily unconstitutional. In what may be a landmark decision, the Court upheld Minnesota's tuition tax deduction.

Our objective for the time we are together is not simply to provide a mini check list of the year's significant opinions. We, hopefully, will provide an overall philosophical framework for understanding the significance of recent rulings. We begin with a somewhat controversial premise – that private schools ought to be promoted as viable alternatives to public schools and that the law can be used to advance that objective.

Obviously our vantage point makes us heretics to some and heroes to others. After all, the nation is embroiled in a raging debate over solutions to remedy the rising tide of mediocrity in public education. In some ways, it is heartening to see the debate shifting to a fight over solutions instead of the problem's existence. This year the National Commission on Excellence in Education published a report entitled *A Nation at Risk*,(1)

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describing the dismal state of American education. Having been hit in the head with this two-by-four, Americans are willing, at long last, to concede the fact that the schools are in terrible shape.

The report describes a steady decline in the quality of American education, when measured against such objective indicators as test scores, literacy rates, English proficiency, foreign language and science enrollments.(2) All of you have, no doubt, heard that before, but the severity of the problem, and the contrasting solutions, can be dramatically understood with a few statistics.

Between 1972 and 1982, the average score on the Scholastic Aptitude Test (SAT) dropped from around 500 to 460 in math and 480 to 420 in English. That, perhaps, would not be so bad had the Educational Testing Service, which administers the SAT, not independently determined that the test had become easier. Other nightmarish examples include an illiteracy rate of about 13% for all 17 year olds in the United States, and an increase by 72% of remedial mathematics courses taught in public four-year colleges.(3) Yet another report states that 58.6% of American high school students in 1981 were enrolled in driver education, while only 37% were taking general science.(4) Traditional courses have been gutted in favor of classes having dubious academic merit. These alarming statistics, and many more variations of the same theme, led the Commission to conclude with the truly memorable phrase that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people."(5) Another dramatic conclusion is, "For the first time in the history of our country, the educational skills of our generation will not surpass, will not equal, will not even approach those of the parents."(6)

So who is responsible for this outrage? Well, says the Commission, we the taxpayers are. We are unwilling to tax ourselves to excellence. As a central assumption, the report attributes the mediocrity to the lack of "availability in this country of sufficient financial means to invest in education."(7) By "education" the report says it refers to "public, private and parochial schools and colleges alike."(8) Yet the Commission simply assumes that government has the job of bailing us out of our pathetic educational predicament. The report claims, "state and local officials, including school board members, governors,

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and legislators, have the *primary* responsibility for financing and governing the schools and should incorporate the reforms we propose. . . "(9)

Viewing government as the cure for our educational ills possibly has some merit if we are willing to see government also as a cause. The injunction should be "Physician heal thyself." Unfortunately, few see government itself as a source of illness. Instead, Americans are accustomed to searching for solutions within the only framework they know, the only framework their fathers and grandfathers knew — the public school monopoly.

We at Mountain States feel that government ought to seek solutions in both the private and public sectors. The two avenues to education need not be at war with one another. Consider, for a moment, the consequences of investing in or promoting a wholly monopolistic system controlled by the government. The National Education Association, which favors such a system, claims implementation of the Commission's recommendations will cost $23.1 billion. Democratic Presidential contender Walter Mondale has advocated an $11 billion increase in funding for public education. Paying the bill for these staggering increases is an obvious problem, yet there is another, more subtle, and more fundamental concern. It is whether increased funding even makes sense. If the system is in fact inefficient, increasing its funding level is not only futile but compounds inefficiency. The "more money" solution to our educational crises is reminiscent of Joseph Heller's words in *Catch 22.*

> "Men," Colonel Cargill began in Yossarian's squadron, measuring his pauses carefully, "you're American officers. The officers of no other army in the world can make that statement. Think about it."
>
> Sergeant Knight thought about it and then politely informed Colonel Cargill that he was addressing the enlisted men and that the officers were to be found waiting for him on the other side of the squadron.(10)

Are politicians addressing the wrong army by suggesting that the educational crises can be solved by more public funding? Are the lemmings charging off a cliff? In a word, the answer is "yes." Before priming the pump with more federal money, it should give reasonable people pause to know that funding for

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education has actually increased over the past 15 years while academic performance has steadily declined. We have doubled the percentage of our GNP committed to education, from 3.4% in 1950 to 6.8% in 1981, and now spend more than any other country. "Meliorative reform," claims author Peter Brimelow,

> has little chance of success because it doesn't serve the interests of the educational bureaucracies . . .The public school system is the American version of Soviet agriculture, beyond help as currently organized because its incentive structure is all wrong. Symptoms include: the persistent tendency . . .to treat capital as a free good and all possible uses of it equal.(11)

Brimelow's point is not unique. A Heritage Foundation report similarly concludes "These groups [referring to groups which favor centralization of education at the federal level] have succeeded in mandating a false and destructive dogma, which aims for an unrealistic rigid equality at the expense of excellence, and dismantles an academically demanding curriculum."(12) In an essay entitled "Liberty vs. Equality" legal scholar Kingsley Browne eloquently argues that "Equality has become the new religion among policymakers."(13) As Browne demonstrates, the "New Equality" pervades government policy and is imposed on everyone as the supreme good. Unfortunately, the "New Equality" the government stamps upon every facet of American life is equality of result — sameness and statistical parity — not the equality of opportunity which allows both excellence and failure.

This "New Equality" is a turnabout on our forefathers. Jefferson wrote "all men are *created* equal" endowed with the inalienable rights of life, liberty and the pursuit of happiness. He felt equality and liberty were independent of the state. The government does not create rights; we cede a portion of our creator endowed liberty to the state for collective security. Lincoln likewise wrote "The authors of that notable instrument [Declaration of Independence], intended to include all men, but they did not intend to declare all men equal in all respects... They defined with tolerable distinctness in what respects they did consider all men created equal — equal with certain inalienable rights . . ."(14) These are not the words of men seeking to impose statistical parity or a change in the social structure. They are words recognizing an existing right and advocating a removal of legal impediments to its exercise.

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Rephrased from my own perspective, the undergirding problem with American education is its failure to view schools as primarily institutions of learning rather than laboratories for achieving social ends. If there is a common theme to the cases we will discuss, it is an ever-present conflict between social and educational ends. The conflict usually arises between the "New Equality" and academic freedom.

However, to so define the problem immediately brands those who opt for educational excellence as bigots and racists by those who feel they have cornered the definition of equality. One clear example is Barbara Honegger's attack on President Reagan. She claims "It is the Reagan Administration itself that is doing everything in its power to reduce the enforcement and narrow the interpretation of the existing statutes that forbid sex discrimination."(15) She continues that "an example is the administration's attempt not to broaden or strengthen but rather to narrow radically the scope of application of Title IX — the federal law that bans discrimination against women in any school, university or educational program receiving federal funds."(16)

Evidently at work in Ms. Honegger's mind are at least two very dangerous assumptions. First, she assumes that the central role of good government ought to be an expansion of its power to eliminate discrimination, even if that means a dishonest reading of enabling statutes, even if the power is extended to private institutions. Significantly, both the government and the college in *Grove City* take the position that Title IX is "program specific," meaning that one program's receipt of government funds does not make an entire private institution subject to regulation. Though the parties are still haggling over the meaning of "receipt," they agree that Title IX is "program specific" for a very good reason: that is what the statute says. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity [as opposed to institution] receiving federal financial assistance."(17)

Second, Ms. Honegger perpetuates a corrupt though in vogue notion of equality wholly at odds with the equality Jefferson and Lincoln wanted to ensure. She wants results, and is quite willing to use the coercive power of the state in achieving that end. All of us are willing to use the state's coercive power in a

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particular context, but we ought to understand what principles might justify a use of power; we ought to have some guiding light of the state's duty to its citizens before the power is invoked willy-nilly.

Let me suggest two justifications for government power and allow you to choose. Both assume the duty of government is to protect liberty, as Jefferson said, yet both presuppose radically opposite definitions of liberty: the first defines liberty as "freedom from" external restraint, and the other as "freedom to" achieve certain ends. Under the "freedom from" concept, we have liberty if the government does not restrain us from pursuing whatever we may have the capabilities to attain. He "who is not in irons, nor imprisoned in a goal, nor terrorized like a slave by fear of punishment," wrote Helevitius, "is free." Liberty "is not lack of freedom to fly like an eagle or swim like a whale."(18) While coercion may be applied to restrain a greater substantive evil, we have liberty when none are encumbered by artificial impediments. The role of government is thus to remove the obstacles.

The "freedom to" concept, the second view, is coupled with power. We have no liberty without the power to effect our choices. It is meaningless to remove impediments, goes the argument, if we simply lack the capacity for achievement of our stated ends. The role of government is thus to guarantee that all those who wish to enter the race finish with everyone else who enters. There are no winners or losers. There is equality.

The best illustration of these opposing views is *Harris v. McRae*,(19) a case in which the Supreme Court held that the government had no constitutional duty to pay for abortions even though a woman has an unfettered right to have one. Writing for the majority, Justice Stewart said the Hyde Amendment, restricting government funding of abortions, was constitutional because "it places no governmental obstacles in the path of a woman who chooses to terminate her pregnancy. . . " Embracing the "freedom from" concept, Justice Stewart held that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."(20)

Dissenting Justice Brennan would have chosen the "freedom to" form of liberty. "The Hyde Amendment," he said, "not only was designed to inhibit, but does in fact inhibit, the woman's freedom to choose abortion over childbirth."(21)

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Justice Brennan argued that freedom of choice is a hollow shell without the power to effect it. Since the state has the financial means to make the choice effective, it must guarantee payment for abortions if freedom is to survive.

Where Justice Brennan's view of liberty prevails, the consequences are significant. Suddenly governments have duties and financial obligations to guarantee fashionable notions of fairness and equality as measured by results. Should the Brennan view be adopted? If the constitution guarantees a freedom to travel, does the state have an obligation to buy everyone bus passes? If parents have a constitutional right to send their children to private schools, does the state have an obligation to pay their tuition?

It is not difficult to see that the "freedom to" concept of liberty makes the state a guarantor of virtually everything within the concomitant power to dictate the terms by which choice is exercised. This "freedom to" liberty consumes the other form. As Kingsley Browne saw it "the government cannot ensure a given outcome without in some way arbitrarily restraining someone else – whether it is by redistributing wealth or by conferring other advantages."(22) Thus, if "New Equality" is the objective, the only possible form of liberty is that advocated by Justice Brennan. Liberty means government intrusion.

In response to Ms. Honegger and those pushing equality of result, it usually carries no weight to say the financial burden of government regulation is too heavy. Certainly, if the "New Equality" is the supreme good, can we really spend too much to achieve it? Probably not, but we should nevertheless understand there are significant costs to pay: integrity, mediocrity, and uniformity.

Here are a few examples of how the pursuit of "New Equality" has cost education: (1) Harvard president Derek Bok has identified "Harvard's independence and freedom from governmental restraint" as the "critical issue for the next generation."(23) Yale president Kingman Brewster, speaking of affirmative action under Title IX said: "We must be vigilant about the use of spending power as a lever to extend regulation beyond the accountability reasonably related to purposes for which it is given."(24) President John Hubbard of the University of Southern California bemoaned encroaching regulations with more strident language: "Do not tell me that there is some

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all-pervading omniscience in Washington or Sacramento that knows better than I how to run this University, that can perceive more clearly than I what its standards and contributions ought to be, or whose sense of fitness of things is more enlightened than mine."(25)

(2) Scholar Nathan Glazer wrote of a regional HEW representative demanding an explanation for the absence of women and minorities in an Ivy League university graduate department. The university responded that a reading knowledge of Hebrew and Greek were prerequisites for graduate study. Whereupon HEW ordered "then end those old-fashioned programs that require irrelevant languages."(26)

(3) In the 1970's, George Washington University lowered the minimal grade point average required for graduation, from 2.5 in a major field to 2.0. The GW administration decided that requiring more than "C" work was unfair since it admitted "C" students.(27)

This gusto for the "New Equality" is evident in the cases we will discuss:

For instance, the government in *Grove City College v. Bell* (28) threatens the viability of private colleges. The legal issue in *Grove City* is whether the government can regulate all or part of a private institution when one of its students receives federal aid. Some Grove City students receive basic educational opportunity grants directly from the government. As part of this process, the college merely certifies the student's attendance. It neither selects the student beneficiary nor administers the grant and has no discretion to discriminate. Grove City argues that it does not, therefore, receive government funds and cannot be regulated under Title IX.

In response, the government argued, until Rex Lee became Solicitor General, that the entire institution was covered by Title IX since the college received or benefited from federal funds. Many of the amici strongly support that position. The Lawyers Committee for Civil Rights, for instance, argues that Title IX should be interpreted broadly as encompassing an entire institution because "the narrow approach could jeopardize the achievement of full equal opportunity for women."(29) The government has shifted its position and now argues that Title IX was meant to be "program specific." That is, only the financial aid program, not the entire institution, is subject to Title IX. But sighs of relief are premature. The government

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also maintains that the college is a recipient of federal funds, even though it has no role in the disbursement of grants. The reason for the government's "half-a-loaf-to-each" solution is hard to follow. The government argues that the college could discriminate in admissions, though the parties agree that Grove City's admissions program is exempt from the Title IX, and that the college does not in fact discriminate. Other cases justify regulation of one program because discrimination in another taints the whole. It is absurd to push that rationale in *Grove City*.

If the government or its amici prevail in *Grove City*, the difference between private and public schools will once again decrease. The college will have less freedom to manage its own affairs and set its own priorities. Private donors wishing to preserve diversity will have less of an incentive to contribute. In short, the "New Equality" pushed on Grove City jeopardizes the diversity and financial stability of private education.

In *Bob Jones University v. United States*,(30) the Court decided that racially discriminatory private schools are not entitled to keep their tax exempt status. Bob Jones University is a private religious school with 5,000 students, enrolled in kindergarten through graduate school. The school refuses to permit students to engage in interracial marriage and dating. Goldsboro Christian School, also a petitioner, admits only Caucasian students. Both schools base their policies on sincerely held religious beliefs.

The Supreme Court adopted the IRS view that to qualify for an exemption an organization must also be "charitable" even though "charitable" is listed as only one of many qualifying categories, such as "educational." The Court said Bob Jones University must also meet the common law definition of charity, though admittedly the code contains no such provision. To meet this common law prerequisite, an institution seeking tax exempt status "must demonstrably serve and be in harmony with the public interest," and not "at odds with the common community conscience . . ."(31)

Justice Rehnquist was the lone dissenter. He noted "in approaching [the] statutory construction question the Court quite adeptly avoids the statute it is construing. This I am sure is no accident, for there is nothing in the language . . .that supports the result obtained by the Court."(32)

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The *Bob Jones* Court obviously reached a politically pleasing result. Yet in its zeal to uphold sanctions against racism, perhaps the Court inflicted more damage, or potential damage, upon us. Before *Bob Jones* religious institutions could maintain a tax exempt status if they fit into some broad purpose listed by Congress, like "educational." There was no government orthodoxy. It now appears that to obtain an exemption, each organization must serve a public purpose, and promote popular public policy. Author Peter Ferrara asks the question "Will the government be willing to tolerate such resistance [to prevailing social values] when it doesn't have to?"(33) Is the IRS now free to revoke the tax exempt status of politically or religiously disfavored organizations? Is there a principled distinction between the *Bob Jones* decision and an order revoking the Mormon Church's tax exempt status for failure to ordain women to the priesthood?

In *Mueller v. Allen*,(34) the Court effectively reversed a 1973 decision by upholding a Minnesota law that allows tax deductions for expenses incurred in providing "tuition, textbooks, and transportation" for children attending elementary and secondary school. The legal fight in *Mueller* was over the establishment clause — whether a deduction amounted to a subsidy of religious schools and therefore violated constitutional neutrality. I think, however, the constitutional issues are merely a camouflage for the underlying concerns about tuition tax credits and vouchers. Opponents see them as a threat to public education, because needed tax dollars will be diverted to something other than the public school monopoly. The Foundation took an opposite position in our friend of the court brief. We argued that the primary effect of tuition tax deductions was diversity, not advancement of religion. We said "Financial support by religious organizations makes quality alternative education available to many who would otherwise be at a serious educational disadvantage. Far from merely providing exclusive education to the wealthy, such schools often offer the sole opportunity for good education, a safe and stable learning environment, and upward social mobility for the economically disadvantaged."(35)

In a public policy sense, *Mueller v. Allen* raises the same problem as *Grove City v. Bell*. What is or should be the government's role in protecting and promoting education? Is it diversity or monopoly? Is it the "New Equality" or educational

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excellence? However Americans answer those questions, we ought to realize that there are tremendous costs in simply pumping more money into public education. America's monopoly system of education has destroyed much of what we cherish. We are moving toward an education milieu in which schools are interchangeable, in which excellence cannot be demanded because of desperate impact upon favored minorities, in which financial relief for those seeking escape is nearly impossible.

America's educational crisis resurrects the issue Daniel Webster argued before Chief Justice John Marshall in *Trustees of Dartmouth College v. Woodward.*(36) *Dartmouth College* was a property case, though not one concerned with tangible property. The college property that Daniel Webster sought to secure from governmental encroachment was intangible – its reins of power. Its commonality with the *Grove City College* case is obvious in the question it asks: shall the government wield control over our country's private educational institutions? Webster pleaded:

> This, sir, is my case! It is the case not merely of that humble institution, it is the case of every college in our land! It is more! It is the case of every eleemonsynary institution throughout our country – of all those great charities founded by the piety of our ancestors to alleviate human misery, and scatter blessings along the pathway of life! It is more! It is, in some sense, the case of every man among us who has property of which he may be stripped, for the question is simply this, Shall our state legislatures be allowed to take *that which is not their own*, to turn it from its original use, and apply it to such ends and purposes as they in their discretion shall see fit!(37)

Webster won his case, but America's devotion to private education has wavered since he argued in 1819. The decades of sacrifice made by today's private institutions to avoid federal control will be rendered meaningless if the government continues in its socialistic zeal to pursue fashionable political goals at the expense of independent schools, colleges, and universities. America's educational "problems will remain chronic," prophesizes Peter Brimelow, "until it is exposed to competition."(38)

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FOOTNOTES

(1) National Commission on Excellence in Education, A Nation at Risk: The Imperative for Educational Reform (1983).

(2) *Id.* at 7-9.

(3) Brimelow, What To Do About America's Schools, *Fortune*, September 19, 1983, at 62.

(4) National Institute of Education report cited in The Heritage Foundation, Closing the Math and Science Gap, May 6, 1983 at 1.

(5) A Nation at Risk, *supra* at 5.

(6) *Id.* at 6.

(7) *Id.* at 16.

(8) *Id.* at 23.

(9) *Id.* at 32. The report repeatedly says the government has the *primary* responsibility of financing the schools and providing the solutions for their problems. *Id.* at 32 and 33 (emphasis in original).

(10) Joseph Heller, Catch-22 28 (Dell ed. 1962).

(11) Brimelow, *supra* at 64.

(12) Heritage Foundation, *supra* at 2.

(13) Browne, Liberty vs. Equality: Congressional Enforcement Power Under the Fourteenth Amendment, 59 Den. L.J. 417, 440 (1982). Browne's analysis in viewing liberty as "freedom from" and "freedom to" is paraphrased.

(14) A. Lincoln, Address Delivered at Springfield, Illinois, June 26, 1857, in Oates, With Malice Toward None 134 (1977).

(15) B. Honegger, Reagan Has Not Fulfilled His Promise, *Washington Post*, Aug. 21, 1983, p. C1.

(16) *Id.*

(17) 20 U.S.C. § 1681 (1972) *et. seq.*

(18) Berlin, Two Concepts of Liberty, reprinted in I. Berlin, Four Essays on Liberty 122, at 122 n.2, quoted in Browne, *supra* at 435.

(19) 448 U.S. 297 (1980).

(20) *Id.* at 316.

(21) *Id.* at 332.

(22) Browne, *supra* at 439.

(23) *Harvard University Gazette*, June 13, 1975 at 1, col. 2, quoted in Browne, *supra* at 455.

(24) Address by Dallin Oaks, President Brigham Young University, to National Association of College and University Attorneys (June 18, 1976), quoting from the Report of the President 22, (Yale University, 1974-75), quoted in Title IX Sex Discrimination Regulations Impact on Private Education, 65 Ken. L.J. 657, 659 (1977).

(25) *Id.* at 660.

(26) Quoted in Browne, *supra* at 456.

(27) *Id.* at 444.

(28) *Grove City College v. Bell*, No. 82-792 (U.S. S.Ct., cert. granted Feb. 22, 1983).

(29) Brief of Amicus, Lawyer's Committee for Civil Rights, et. al., *Grove City College v. Bell, supra* at 2.

(30) *Bob Jones University v. United States*, 51 U.S.L.W. 4593 (1983).

(31) *Id.* at 4598.

(32) *Id.* at 4603.

(33) Ferrara, Religion and the Constitution, a Reinterpretation 132 (1983).

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(34) *Mueller v. Allen*, 51 U.S.L.W. 5041 (1983).

(35) Brief of Amicus, Mountain States Legal Foundation, et. al., *Mueller v. Allen, supra* at 3.

(36) *Trustees of Dartmouth v. Woodward*, 17 U.S. 518 (1819).

(37) Recorded in letter from Chauncey Goodrich to Rufus Choate (Nov. 25, 1852, *Dartmouth College*), cited in L. Baker, John Marshall 661-62 (1970).

(38) Brimelow, *supra* at 64.

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THE FAMILY, PRIVATE EDUCATION, AND THE PUBLIC SCHOOLS

By Bruce C. Hafen

My primary research interests are in the field of family law. However, I have found that many of the principles one encounters in family law apply to education, especially in considering such matters as parents' rights, children's rights, and society's interest in the welfare and development of the young.

In the interest of establishing a broad perspective on the subject of our conference, I would first like to discuss, in a very general way, the rights and the responsibilities of parents for the rearing of their children, according to the legal and cultural assumptions of American society. I will then consider briefly some of the factors that limit the range of parental freedom, particularly when it comes to education. The remainder of my remarks will be devoted to a discussion of some of the problems facing parents today regarding the education of their children and a few possible approaches to those problems.

Historians of the family are in some disagreement whether today's nuclear family is a recent social development. Some argue that at least the concept of a prolonged childhood is a relatively recent invention, emerging in Europe only within the last few centuries. They cite as their primary authority a book, by the French historian Phillipe Aries, entitled *Centuries of Childhood*.(1) In this book Aries documents his view that during the Middle Ages, European children were typically absorbed into the working world of adults at about the age of seven. Aries suggests that the concept of a long childhood – and thus a concept of extensive family life – emerged only with the coming of the Industrial Revolution. A close reading of Aries' work makes clear, however, that the Europeans of the Enlightenment did not *invent* extended childhood; rather, they rediscovered it. Aries himself notes, in an offhand way, that medieval society had lost sight of established Greek and Roman concepts about education and childhood: "Medieval civilization had forgotten the *paideia* of the ancients and knew

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nothing as yet of modern education. The age groups of Neolithic times, the Hellenistic *paideai*, presupposed a difference and a transition between the world of children and that of adults, a transition made by means of an initiation or an education. Medieval civilization failed to perceive this difference and therefore lacked this concept of transition. The great event was therefore the revival, at the beginning of modern times, of an interest in education."(2)

Other sources make it clear that both family life and the prolonged education of children flourished during the high points of ancient Greek and Roman cultures. In these greatest of the ancient societies, childhood was viewed as the time for obtaining the education necessary for responsible entrance into the adult community. As the glories of the Roman Empire gave way to the Middle Ages, childhood, family, and education all took on drastically reduced importance. These changes may be one reason we refer to this period as the "Dark Ages." When Western civilization gradually emerged from that darkness, the ancient concept of childhood, with its concomitant emphasis on prolonged education, returned. This reappearance was not remarkable in an age that sought to emulate the art forms, law, political institutions, and philosophy of the Greeks and Romans. In any case, in these earlier historical references there is a clear link between the family and education.

In American society, all the tributaries in our stream of legal thought reflect the concept of parental control over the rearing of their own children. Thomas Aquinas wrote that one of the most obvious examples of the operation of natural law is the education of one's own offspring.(3) This natural law heritage has been expressed in the development of our common law cases on parental rights as well as the legislative enactments that bear on family relationships. The basic premise of the American juvenile court movement, which began around 1900 in Illinois, was that children need and deserve, above all else, the nuturing care of parents in a family home. In the 1920's the U.S. Supreme Court gave constitutional status to the right of parents to direct the upbringing of their children in two important cases – *Meyer v. Nebraska*(4) and *Pierce v. Society of Sisters*.(5) In the *Pierce* case, the Court found unconstitutional an Oregon compulsory education law that required attendance at *public* schools only. The Court recognized the interest of both the state and the children themselves in a basic education, but said

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the state could not limit that schooling to public education only. To deny parents the right to choose a private school education is, said the Court, an unconstitutional interference "with the liberty of parents to direct the upbringing and education of children under their control. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

In the *Meyer* case, the Supreme Court had contrasted the assumptions of American society with the ideal system anciently recommended by Plato. Under Plato's system, said the Court, "the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent." The purpose of this system was to "submerge the individual and develop ideal citizens." The Court continued: "Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest."

The theory of the *Meyer* and *Pierce* cases was reaffirmed by the Court in the 1972 case of *Wisconsin v. Yoder*.(6) In *Yoder*, the Court found its primary support in the First Amendment's protection of religious liberty in concluding that families belonging to the old Amish religious order did not violate Wisconsin's compulsory school laws when they removed their children from the public schools after the eighth grade and educated them through the private practices and customs of the religious order on their community farms. The religious freedom claim in the *Yoder* case was buttressed by the Court's references to the "history and culture of Western Civilization," which "reflect a strong tradition of parental concern for the nurture and upbringing of their children."

There are many important reasons why this deference to parental authority is considered so fundamental in our society. For example, modern civilization is soaked through with a sense of anomie and alienation, heightened by feelings of helplessness against ever increasing concentrations of power in such "megastructures" as the business conglomerate, the boundless govern-

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mental bureaucracy, and the national labor union. In the midst of such massive concentrations of power, we appreciate the words of Edmund Burke: "To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections."(7) Many today long for identification with some "little platoon" that will create a sense of personal meaning and personal value for their lives. Thus, increased attention is being given these days to both the personal and public policy significance of such "mediating" structures as neighborhoods, families, churches, and voluntary associations. Peter Berger and Richard Neuhaus, who coined the terms "megastructure" and "mediating structure," have observed that in a truly democratic society, the mediating structures are the value generating and value maintaining agencies of the society. Therefore, when these structures are inactive or ineffective, society inevitably looks to the megastructures – notably the State – as a source of values. The totalitarian State gladly and aggressively assumes that role, just as it would have done under Plato's theory of the ideal State. Indeed, the attractiveness of the totalitarian state in the eyes of some is that "it overcomes the dichotomy of private and public existence by imposing on life one comprehensive order of meaning."(8) The democratic State, however, makes no claim to be the ultimate source of personal meaning and values, nor would we allow it to do so, because that role for the State contradicts the assumption on which our entire political system rests – the idea that each citizen should be free to determine the meaning of his or her own life.

A recent analysis of the concept of mediating structures identifies the family as "the major institution within the private sphere, and thus for many people the most valuable thing in their lives. Here they make their moral commitments, invest their emotions, [and] plan for the future."(9)

There are, however, limitations on parental liberty, which derive from both the interests of society and the interests of children. These interests underlie a number of legal and other limits that have been placed on the freedom of parents to do as they please with their children. The society as a whole has a tremendous interest in what happens to its children. As observed by Roscoe Pound, there is a legitimate social interest in "the maintenance of the family as a social institution" and in "the protection of dependent persons, in securing to all

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individuals a moral and social life and in the rearing and training of sound and well-bred citizens for the future."(10) Our legal system has also recognized a general right of the children themselves, as dependent persons, to be not only protected, but also to be prepared for adulthood.

In ancient Rome, fathers had the power of life and death over their children. In more recent times, parental power has been restricted. Blackstone tells us that under English common law, parents were allowed only to "lawfully correct" their children "in a reasonable manner: for this is for the benefit of" the child's "education."(11) Similarly, John Locke (who influenced Thomas Jefferson so much with his ideas on the individual rights of man) wrote that the parental role was an educational one designed for the benefit of children. As such, the rights of parents did not give them "a power of command over their children, or an authority to make laws and dispose as they please of their children's lives and liberties."(12)

This general idea has led in our own day to a concern with child abuse, neglect, and abandonment. It led also to the establishment of child labor laws. Consider some of the important Court decisions in this area. In 1943, the Supreme Court upheld the conviction of a woman who violated the child labor laws of Massachusetts by permitting her nine-year-old niece to sell religious literature on a public street corner. Said the Court: "Parents may be free to become martyrs themselves. But it does not follow that they are free to make martyrs of their children before they have reached the age of full and legal discretion when they make that choice for themselves."(13) As since interpreted by the *Yoder* case, parental discretion will be interfered with only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."(14) Thus, for example, a federal court in one case directed that a blood transfusion be given to the child of Jehovah's Witness parents, since failure to give the transfusion would threaten the child's life.(15) Other court cases have upheld the right of the public health services to give vaccinations to school children, despite the objections of their parents, on the grounds that without the vaccinations, the children were not only threatened themselves, but were also a threat to others. Another case upheld the right of public school officials to administer limited corporal punishment to students without parental consent when the action was required to main-

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tain school order.(17)

Turning more specifically to the area of education, the right of parents to direct the rearing of their children does not completely outweigh the right of society – acting through governmental agencies – to maintain standards necessary to ensure a minimal level of educational quality. Again, this social interest is for the benefit of the child as well as the larger society. In the 1925 *Pierce* case mentioned earlier, which upheld the right of parents to send their children to a private school, the Supreme Court commented directly on authority to regulate private education within the spirit of the compulsory education laws. The Court said the case raised "no question concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."(18)

It was indeed democratic *society's* interest in an educated citizenry that originally motivated Thomas Jefferson to promote the idea of universal education. Jefferson was concerned not only that children be educated enough to function as informed citizens. He was also concerned that education be available to the masses in order to balance the influence of aristocracy and political factions. In this way, he thought universal education would encourage a national sense of community and interdependence. The national motto engraved on our coins reflects this Jeffersonian ideal: E Pluribus Unum – out of many, one. This concept of America as the great "melting pot" was never intended to *extinguish* individual identity; rather, it sought to *preserve* individual identity by creating sufficient social harmony and understanding that people would voluntarily cooperate – not to extinguish their differences, but to maintain a climate free enough to preserve their differences.

The need to balance parents' interests against the interests of their children and of society is illustrated by the issue of bilingual education. A few years ago, some parents and others took the position that schools should be required to teach in the native tongue of ethnic minorities. Secretary Bell and the Department of Education responded that such a program was not only prohibitively expensive, given the number of native

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languages among American minority groups; more significantly, the program would *perpetuate* the inability of the children in these groups to function successfully in an American society where the mother tongue is English. Thus, the Education Department rejected the requirement of mandatory bilingual education, believing that the teaching of English to these children would be a much more constructive long-term response to their needs, even though that would not always be the parental preference. There may nonetheless be a need in certain circumstances for some instruction in a mother tongue as a bridge to eventual all-English instruction.

The general place of education in serving the interests both of the young and of society in general was captured in this language by the Supreme Court in the famous 1954 case of *Brown v. Board of Education*. "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."(19)

These two broad principles – one supporting the right of parents to direct the upbringing of their children, the other supporting society's right to require certain minimal educational standards – have coexisted and interacted successfully for many years, as the United States has developed and maintained the world's most successful publicly-funded system of universal education. Within the last several years, however, a number of problems have developed that now threaten this once harmonious relationship between the home and the school. I will mention four of these general problem areas.

One serious problem has been the decline of natural parental authority in the home. This problem is far too complex to be discussed fully here, but in simply noting it, I would refer you to a book by Christopher Lasch entitled *Haven in a Heartless World*.(20) Lasch reviews the last 100 years to find that Ameri-

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can families have gradually transferred many important child-rearing responsibilities to agencies of society and the state. One cannot say that this process has been caused simply by governmental policies or the work of the social service professions or by the desire of parents to be free of the arduous responsibilities of child-rearing. There is blame enough to go around for all of these, and other possible causes. The problem is a serious one, whatever its causes, because the training a child receives in a family home is different from anything in a school, a church, or any other institution can provide. The uniqueness of this training comes primarily from the natural combination in parents of both love and discipline. In the words of Christopher Lasch: "The best argument for the indispensability of the family is that children grow up best under conditions of intense emotional involvement with their parents. Without struggling with the ambivalent emotions aroused by the union of love and discipline in his parents, the child never masters his rage or his fear of authority. It is for this reason that children need parents, not professional nurses or counselors."(21) Thus, continues Lasch, because social institutions simply cannot do what families do, our excessive reliance on those institutions has weakened tremendously the capacity of our people for self-direction and self-control. In addition, we have undermined one of the principal sources of social cohesion.

A second general problem has been the emergence of an unbalanced view of the relationships between religion and public life. No small part of the responsibility for this problem lies with the Supreme Court of the United States, though the Court has been encouraged – almost overwhelmed – both by special interest groups and by a growing public ambivalence in this country about institutional religion. In a nutshell, the Supreme Court has been unable to maintain a consistent definition of the two religion clauses in the First Amendment to the Constitution. One of these clauses guarantees all persons the right to free exercise of religious beliefs. The other protects against establishment by the state of an official religion. The free exercise clause has been interpreted very broadly in recent years, to the point that – as Dallin Oaks has said – it now protects not only the exercise of religion, but the exercise of philosophy.(22) For instance, in the name of the free exercise clause of the First Amendment, a conscientious objector to

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the draft laws may be excused on account of deeply held personal beliefs that may not fit our sense of religion in any traditional sense. On the other hand, the establishment clause has been defined more narrowly, restricting government from giving support to institutional religions. The effect of these two contradictory definitions of religion is that institutional religion has been seriously limited in the role it can play — symbolically or otherwise — in public life. At the same time, other philosophies and value systems are allowed to enjoy strong governmental support without being considered an establishment of religion. Thus, some have expressed grave concern that we have established irreligion as the state religion of the United States.(23)

A third general problem has grown out of what I have just observed. Given that absence of restrictions on the government's authority to espouse certain nonreligious causes, and given the government's commitment in recent years to equality and the elimination of discrimination on the baisis of race, sex, and other factors, the state has assumed a more aggressive posture than before in giving official sanction to certain officially approved value positions. At the same time, ironically, public school teachers and administrators have backed away from the affirmative teaching of basic principles of personal character and patriotism. School officials have been intimidated as the teaching of religious and other values has been increasingly challenged in the courts of law. I will mention in a few moments why I think this intimidation represents an overreaction. The reluctance to teach patriotism is largely attributable to the pervasive national skepticism that flooded the land during the era of the Viet Nam war and Watergate. A general hesitation to talk about traditional values in the schools may also have been affected by an increasing fragmentation of the national consensus on all kinds of issues for which there would once have been a widely shared sense of social support. Some thoughtful observers believe we are now experiencing a greater disintegration of shared values and cultural assumptions than ever before. That broad social phenomenon has had its effect in the public schools.

A related issue is that the government's vigorous commitment to equality could conceivably create a serious challenge to the principle of family autonomy. Recent research suggests that family background and home environment are so powerfully

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influential that schools by themselves *cannot* overcome the effects of developmental inequalities among children. Therefore, only the most massive forms of government intervention will truly advance the social goal of equalizing educational outcomes. Professor Fishkin has identified two major strategies for such intervention: "levelling up," which increases the resources and opportunities available to disadvantaged groups, and "levelling down," which achieves greater equality by lowering the resources and opportunities available to the more advantaged strata. Fishkin points out that the option of private schools is a crucial barrier to levelling down strategies, because that option allows advantaged families an escape route from such approaches to equalization. For this and other reasons, levelling down efforts could be imposed only at a high cost to the principle of family autonomy. The most effective levelling up strategies, such as preschool intervention, also threaten family autonomy, because the most impressive cognitive gains have been achieved only through interventions so massive that a child's home environment is essentially replaced with a new environment supervised by professionals. In such circumstances, the "improvement in children's cognitive development may have to be balanced against such 'harmful effects' as impaired identity with parents." Experience throughout the field of juvenile court and family has shown that "disruption of intact families usually does more harm than good to the child, except in the most extreme cases of deprivation or abuse."(24)

The fourth general problem includes a cluster of behavioral challenges among students in the public schools. A 1981 Gallup poll on the attitudes of Americans toward the public school system found that lack of discipline was thought to be the number one problem facing the schools. Ranking second was concern about drugs. As public confidence in the schools has been affected by these nonacademic factors, the percentage of people giving public schools an "A" grade has fallen from 18% in 1974 to 9% in 1981. Not surprisingly, then, 49% of the public consider the growth of private education to be a good thing, while 30% consider it a bad thing. And yet it was the public's perception in this same national poll that the number one reason for an increase in private education is the opportunity of superior educational training. The second reason listed was busing. In addressing the subject matter areas most needing attention in the public schools, those being polled listed charac-

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ter development as the number one need, followed by the need to teach students how to think and the need to prepare them for jobs.(25)

In the remaining portion of my remarks, I would like to talk about some of the alternatives available to parents in confronting these problems. Rather than talking only about private education as a solution, I will mention the other basic alternatives as a way of putting private education in perspective. Given the complexity of the times, and given the reality that no single national solution is risk-free, this approach seems the most productive.

Let us first consider the formal private school. A church-related private school has the obvious advantage of offering an accredited curriculum within the clear framework of a set of religious values that can be chosen according to its compatibility with parental values. Other private schools may lack a religious orientation, but may be more demanding than the public schools in the disciplinary standards and perhaps in their academic rigor. Private elementary and secondary schools now enroll about 10% of our school-age youth, and the percentage seems to be increasing. Only ten or fifteen years ago, the costs of running private schools had caused a decline in their use. Private schools must meet state accreditation standards in terms of teacher qualifications, physical facilities, financial base, and basic curriculum. The schools may add to the prescribed subjects, but only after meeting the basic set of requirements.

In 1981, Professor James Coleman, one of the country's best known researchers on educational matters, published the results of a massive study comparing public and private education.(26) Coleman found that the perceptions of the public about private schools are not far off the mark. The private schools tend to be more disciplined, safer, and more academically rigorous. Students in general have more homework and enroll in more demanding subjects. For example, Coleman found that students in private schools spend 70% of their time studying hard core academic subjects such as math and science, while students in the public schools on the average spend only 34% of their curriculum time in tough academic classes. The public schools are also much more oriented toward vocational education, with public school students spending 27% of their curriculum time in vocationally oriented studies while the

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private school students spend but 9% in those subjects. Perhaps the most significant finding of the Coleman study was the conclusion that the higher academic standards and more orderly environment of the private schools produce greater achievement in student learning, even when such factors as race, income level, and other family background characteristics are held constant. This portion of the report has been hotly disputed, because Coleman's findings contradict earlier studies which found that family background was more determinative of educational outcomes than was the school environment. Other critics charge that Coleman's research is biased by the self-selection process inherent in the makeup of a private school. In other words, the same personal characteristics that make people choose a private school show up in the tendencies of private school students toward self-discipline and achievement. In addition, other recent research has found that when students in the public schools choose to enroll in more demanding college-prep classes, their cognitive achievement is equal to that of private school students.(27)

With Coleman's findings now in hand, why doesn't the nation simply abandon the public school system and send everyone to private schools? There are several reasons. For one thing, private education is very expensive. To create a massive private system while still financing the public system would be even more expensive. From the standpoint of Jefferson's original hopes for universal education, private education is not a comprehensive alternative because it has only been accessible to the wealthy. In that sense, it aggravates Jefferson's concerns about dividing the nation, rather than bringing the nation together. Moreover, the findings of the Coleman report are primarily findings about the effectiveness of certain educational policies. It is at least arguable that policies demanding greater student discipline and a more academic curriculum could be followed in the public schools as well, given a supportive public climate.

In addition, there is some basis for fearing that a widespread proliferation of private schools would completely reorient the concept of neighborhood and community schools, which play such a major role in encouraging social and political cohesion. One response to the neighborhood school arugument is that forced busing in larger cities has destroyed that concept already, and that perhaps the children of the ghettos need a school environment different from their neighborhood environment

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anyway. Also, the financial challenge of increased private education might be met by a voucher system that lets parents choose whether to direct their portion of the educational tax base toward a private or a public school. There are, however, a number of problems with voucher systems. This is not the time for a complete discussion of that issue, but it might be noted in passing that the state assistance necessary to administer a voucher system may make voucher aid to church-related schools unconstitutional. Furthermore, many advocates of voucher systems simply assume that a good deal of public regulation must accompany the use of vouchers for private schools, so that private schools may become much less private when vouchers are involved. When that happens, the whole point of having a private school may be undermined.

A second alternative is the home school, in which parents or small neighborhood groups simply conduct their own school system. This approach is obviously less expensive than other forms of education. In addition, though laws vary greatly from state to state, most states will permit home schools so long as certain criteria are met regarding teacher qualifications, curriculum, adequacy of facilities, and the like. The general standard for a home school's meeting state compulsory education requirements is simply "equivalency:" whether the education provided in the home is the academic equivalent of what would be provided in either a public or an accredited private school. Parents may have a slightly lower burden to carry in proving equivalency if they can show that keeping their children at home is a legitimate exercise of their religious liberty. That was the point of the *Yoder* case. The state still has a basic responsibility to ensure the educational quality of a home school, however, even with a religious liberty claim by the parents, because of the important interests of society and of the children as mentioned earlier. It is important to remember that in the *Yoder* case, the Amish parents left their children in the public schools until the eighth grade. The language of the Supreme Court in *Yoder* made it very clear that even the strong religious liberty claim the Court recognized may not have justified a longer removal from the schools than the few years the Amish wanted.

Professional educators have not generally been very enthusiastic about home schools, although opinions vary widely, probably depending on the experience of those involved. There

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is a general skepticism about the sheer ability of parents — even when they are qualified to teach — to remain consistently committed to running a serious education program day in and day out, with all the other things parents need to do. There has also been a concern about the social isolation of home school students. At the same time, a few parents have demonstrated the capacity to do it all and do it well. Opinions seem to vary also according to the ages of the children involved. Whether they recognize it as education or not, virtually all parents educate their children at home for at least the first five or six years. In my home state of Idaho, the compulsory education law begins at age eight, though very few parents elect to keep their children at home after kindergarten age.

A third alternative is to send children to public schools, but enroll them in released-time programs in religious education, when available. This practice has been repeatedly upheld against claims of its unconstitutionality. A recent Utah case on this subject also upheld the validity of released time instruction, though the awarding of state credit for specific courses in religious doctrine was not allowed.(28) Released time illustrates a reasonable state accommodation of the rights of parents to educate their children according to their own religious values, while at the same time allowing their children to have the general benefits of public schooling. Many religious leaders consider it no great loss that state credit is not given for doctrinal instruction, since worries about qualifying for state credit may dilute doctrinal instruction to the point of undermining its entire purpose.

A fourth and even more limited alternative is the practice of granting individual exemptions to students, at parental request, from certain matters of instruction considered offensive to parents. When sex education programs are presented in a public school, for example, parents may obtain an exemption from participation in such instruction for their children. The circumstances justifying exemptions vary widely, but at least the parental claim must be a serious one. Otherwise, the schools would be spending inordinate amounts of time providing individualized instruction that can become impossible to administer simply as a matter of logistics. The concept is nevertheless important, as parents seek to exercise at least some control over the limits to which public education programs may go in influencing their children. To make use of this

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idea, parents must obviously stay in touch with local curriculum plans.

A fifth alternative is for parents to make a greater effort to encourage a balance in the value positions being taught in the public schools. Again using sex education as an example, I am aware of some work done by a group of concerned parents in the Chicago area who were successful in securing appropriate approval to *require* that all courses dealing with the prevention of unwanted pregnancies present in a fair and balanced manner the alternative of abstinence, which also has a way of avoiding pregnancy. Another illustration of this approach is the work being done in some states by groups of parents intelligently working with teachers and administrators in the selection of high quality textbooks and literature. In all such efforts, the public schools are required by the Constitution not to establish religion. But there is a great deal that can be done in the realm of character education that in no way amounts to an establishment of religion.

In my opinion, both the public and public school personnel are being seriously misled these days about what is religiously based and what isn't. Let me illustrate. A few years ago, Congressman Henry Hyde sponsored a legislative measure adopted by Congress for restricting the use of federal funds for nontherapeutic abortions. This "Hyde Amendment," as it was called, was challenged in a federal court in New York by the American Civil Liberties Union essentially on the grounds that since Congressman Hyde was a practicing Catholic, the bill he sponsored was an unconstitutional establishment of religion. As silly as that argument seems to me, it was upheld by the trial court, even though it was later overturned on appeal.(29) The same line of reasoning motivated some to argue a year or two ago that a Mormon judge in Idaho should not be allowed to hear a case dealing with the Equal Rights Amendment. Anyone who really accepts that position would theoretically not permit a black judge to hear a civil rights case or permit a female judge to hear a sex discrimination case. I suppose a male judge shouldn't hear one either. I wonder who should hear them? In public education, the same assumptions would logically make it a state establishment of the Ten Commandments to teach children they should not lie and not steal.

The reality is that virtually all of society's moral precepts — including our criminal laws — have their origins in religion. All

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that is constitutionally necessary to permit the public schools to teach those precepts is to show that they have a socially useful purpose and do not promote a particular religion. Many, many fundamental concepts of character and moral values could be forcefully taught and advocated without seriously raising a church/state issue. The need for such teaching has already been identified by the 1981 Gallup poll I noted earlier as the greatest curricular need in the public schools today. I suspect that a renewed emphasis on this subject could also go far toward helping the schools restore a greater sense of personal and academic achievement.

Boston University President John Silber recently gave a talk entitled, "The Gods of the Copy Book Headings: Reflections on the No-Fault Life."(30) Dr. Silber began his talk by noting, "Every thoughtful person today must be concerned with the state of citizenship education." The concern "would have baffled Theodore Roosevelt and made little sense to William Holmes McGuffey," for "as recently as 25 years ago, citizenship education, that is, education of the child in morals and civic duty, was the central core and focus of all primary and secondary" education. "It was what education was about. Thomas Jefferson took for granted that education was citizenship education when he stated his belief that education is indispensable to the working of democracy."

Silber went on to recall the approach of the "copybooks" used by school children during an earlier era in American education. Even in their handwriting exercises, the children wrote, over and over again, such memorable and value-laden statements as, "Persevere in accomplishing a complete education. Quarrelsome persons are always dangerous companions. An unweeded garden goes to seed. Employment prevents vice. Great men were good boys. Build your hopes of fame on virtue." Now tell me – do these statements establish a state religion? How about a couple of other samples from the copybook headings: "A stitch in time saves nine. The idle fool is whipped at school. Dogs will bite a thief at night. Wit should never wound." Does that sound like a sinister plot by religious zealots to force the supple mind of a child into enslavement by an otherworldly theology? Of course not. But where are those sentiments in today's schools? Well, they are sprinkled here and there, by an admirable cadre of public school teachers and administrators who have enough common sense to know that citizenship is

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still one of the very reasons for their existence. No legal or any other requirement is holding back administrators, teachers, and parents from broadly encouraging a serious commitment to that kind of education.

Let me share with you Rudyard Kipling's poem, "The Gods of the Copybook Headings." Kipling contrasts the Gods who inspired the down-to-earth wisdom of those little copybook sayings I have quoted with another set of worldly Gods – the Gods of the Marketplace, whose unprincipled influence seems to hold more sway these days.

As I pass through my incarnations in every age and race,
I make my proper prostrations to the Gods of the Marketplace.
Peering through reverent fingers I watch them flourish and fall.
And the Gods of the Copybook Headings, I notice, outlast them all.

We were living in trees when they met us. They showed us each in turn
That Water would certainly wet us, as Fire would certainly burn;
But we found them lacking in Uplift, Vision and Breadth of Mind.
So we left them to teach the Gorillas while we followed the March of Mankind.

We moved as the Spirit listed. They never altered their pace,
Being neither cloud nor wind-borne like the Gods of the Marketplace.
But they always caught up with our progress, and presently word would come
That a tribe had been wiped off its icefield, or the lights had gone out in Rome.

When the Cambrian measures were forming, They promised perpetual peace.
They swore, if we gave them our weapons, that the wars of the tribes would cease.
But when we disarmed, They sold us and delivered us bound to our foe.
And the Gods of the Copybook Headings said: 'Stick to the Devil you know.'

On the first Feminian Sandstone we were promised the Fuller Life
(Which started by loving our neighbor and ended by loving his wife)
Till our women had more children and the men lost reason and faith,
And the Gods of the Copybook Headings said: The Wages of Sin is death.

In the Carboniferous Epoch we were promised abundance for all.
By robbing selected Peter to pay for collective Paul;
But though we had plenty of money, there was nothing our money could buy.
And the Gods of the Copybook Headings said: 'If you don't work you die.'

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Then the Gods of the Market tumbled, and their smooth-tongued wizards withdrew.
And the hearts of the meanest were humbled and began to believe it was true.
That All is not Gold that Glitters, and Two and Two make Four
And the Gods of the Copybook Headings limped up to explain it once more.

As it will be in the future, it was at the birth of Man —
There are only four things certain since Social progress began: —
That the Dog returns to his Vomit and the Sow returns to her Mire,
And the burnt Fool's bandaged finger goes wabbling back to the Fire;

And that after this is accomplished, and the brave new world begins,
When all men are paid for existing and no man must pay for his sins,
As surely as Water will wet us, as surely as Fire will burn,
The Gods of the Copybook Headings with terror and slaughter return!

If the attitude of that poem could be instilled in the very foundation stones of the public schools, perhaps there would not be so much cause for concern these days about the future of Jefferson's dream of an education for all Americans. Neither the federal government nor the separation of Church and State stand in the way of bringing the public schools back, not only to the basics of sound academic learning, but also to the basics of citizenship education.

A sixth and final alternative, regardless of whether parents choose to send their children to public or private schools, is to do all we can to encourage parents to make their homes real centers of education. The fact is that all children who live in American homes have essentially a home school during the most formative years of their lives, yet there is cause to wonder whether the magnitude of that educational responsibility has dawned on the parents across the land. And as children continue on, whatever form of schooling they have, the influence of the home on the child's overall education can hardly be overstated. Research studies of all kinds show that a child's educational success and other forms of achievement are influenced infinitely more by family background and home environment than by any other conceivable factors. In the Idaho school district where I live, for example, statistics show that expenditures per pupil are ranked 48th among the 50 states. And yet the average cognitive achievement of students in that district is well above national norms. The school superintendent tells me

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the main reason for that record is the kinds of homes the students come from. No amount of public expenditure can compensate for the failure of parents to assume the primary reponsibility for not only *rearing*, but, in the most serious sense of the word, *educating* their children. Thus, any home worthy of the name is by definition a home school, regardless of how that special kind of school may be supplemented by public or private institutions.

Let me conclude my comment on this sixth alternative with an illustration of what I mean. A distinguished national commission recently examined the state of the humanities in the United States. I was asked, along with several other Idahoans, to comment in a public forum on the strengths and weaknesses of the commission's report. The commission was alarmed at the prospect of reduced governmental funding for supporting the arts and other forms of the humanities. But throughout the entire report, not a word was said about the place of the home in supporting education in the humanities. This is an excerpt from my comments: "Last Saturday, on the campus of Ricks College, over 800 youngsters from the 'greater Rexburg' area (a population of not more than 15,000) played their musical hearts out for an army of critical but loving judges from the ranks of the private music teachers in nearby communities. The real heroes of that day were the mothers and fathers of those budding young artists, whose devotion to the highest aims of the arts is reflected not only in financing private lessons with precious dollars, but also in endless hours of patient supervision on a piano bench. There may be no royal road to geometry, but there is a common and well-worn path – to geometry as well as the arts and humanities. That path is the piano bench, or its equivalent in other disciplines. Two essential ingredients along that path are the active participation of the students and the constant commitment of the parents. I saw little reference to either ingredient in the commission's report.

"The arts, the humanities, and their attendant disciplines are alive and well in Southeastern Idaho. As a result, much else is alive here. The life that flowers here owes everything to the homes of this community. Without the active involvement of those homes in the pursuit of whatever is true and good and beautiful, I have little hope for the humanities in Idaho or elsewhere. With that involvement, we can live with governmental funding problems and many other limitations. I am disap-

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pointed that the commission did not see that connection."

I hope this survey of problems and possible solutions has not been too broad. I readily acknowledge that conditions vary enormously from one geographic area to another. I also acknowledge that part of the strength of the American system is that parents are free to choose among many alternatives as they do what they feel is best for their own children. Whatever choices we make and wherever we may live, my hope is that we can be faithful to both of the freedom principles I mentioned at the outset: the freedom of parents to direct the education of their children and the freedom of our children and our society to expect the very best from all of us.

FOOTNOTES

(1) P. Aries, *Centuries of Childhood* (1962).
(2) *Id.* at 411-12.
(3) T. Aquinas, *Summa Theologica, Treatise on Law*, Question 94, in *The Great Legal Philosophers* 67 (1959).
(4) 262 U.S. 390 (1923).
(5) 268 U.S. 510 (1925).
(6) 406 U.S. 205 (1972).
(7) P. Berger and R. Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* 4 (1977).
(8) *Id.* at 3.
(9) *Id.* at 19.
(10) Pound, "Individual Interests in the Domestic Relations," 14 Mich. L. Rev. 177 (1916).
(11) 1 W. Blackstone, *Commentaries* 451.
(12) J. Locke, *The Second Treatise of Government* § 66.
(13) 321 U.S. 158 (1944).
(14) 406 U.S. at 234.
(15) *Application of the President and Directors of Georgetown College*, 331 F.2d 1000 (D.C. Cir. 1964).
(16) *E.g., Zucht v. King*, 260 U.S. 174 (1922).
(17) *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C. 1975) *aff'd mem.*, 423 U.S. 907 (1976).
(18) See note 4.
(19) *Brown v. Board of Education*, 374 U.S. 483 (1954).
(20) C. Lasch, *Haven in a Heartless World* (1977).
(21) *Id.* at 123.
(22) Oaks, "Religion and Law in the Eighties," in *Belief, Faith and Reason* (J. Howard Ed. 1981).
(23) LDS First Presidnecy Statement, "America's Religious Heritage," March, 1979.
(24) J. Fishkin, *Justice, Equal Opportunity, and the Family* 67-79 (1983).

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(25) G.H. Gallup, "Thirteenth Annual Gallup Poll of the Public's Attitude Toward the Public Schools," *Phi Delta Kappan* Sept., 1981, pp. 33-46.

(26) D. Ravitch, "The Meaning of the New Coleman Report," *Phi Delta Kappan* June, 1981, pp. 718-720.

(27) *Education Week*, Oct. 12, 1983.

(28) *Lanner v. Wimmer,* 463 F. Supp. 867 (D. Utah 1978), 662 F.2d 1349 (10th Cir. 1981).

(29) *McRae v. Califano*, 491 F. Supp. 630 (E.D.N.Y.) *Rev'd* 448 U.S. 297 (1980).

(30) Speech delivered November 25, 1980, Thomas Jefferson Research Center, Pasadena, California.

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GROVE CITY COLLEGE V. BELL: HOW LONG IS THE FEDERAL REGULATORY REACH?

By David Lascell

Grove City is a college of about 2,200 students, located about an hour north of Pittsburgh, Pennsylvania. It is a little over one hundred years old. Like so many Eastern colleges, it was founded and begun as a school with some church affiliation. That affiliation ended a good many years ago, and while it retains many of its Christian values, it is not a church-related institution, as many of you would think of church-related institutions. Grove City has been co-educational since its founding and his has supported non-sex discrimination for many years, long before there was a Title IX. Despite that, back in 1976, Grove City began to have a run-in with the federal government which continues and will continue until a decision by the Supreme Court.* Its run-in with the federal government involved Title IX, that anti-sex discrimination statute passed back in 1972.

Grove City is a little different than most other colleges with which you might be familiar. It has consciously chosen to stay far apart from state and federal funding and from any kind of state and federal assistance. Thus, it has refused construction grants; it has refused loans from the State of Pennsylvania for a variety of puposes, the most recent one of which was a grant program started by Pennsylvania just a couple of weeks ago, to help train mathematics and science teachers. Grove City has refused those kind of programs. Grove City has refused to participate in any of the government programs which are campus-based. Grove City has done all that since its founding because it believes that if you accept federal money on an institutional basis, you can and should anticipate federal control of some sort, or state control of some sort if the assistance happens to be state funding. Instead, Grove City contends that it operates

* The *Grove City* case was decided by the Supreme Court as this issue was going to press. The Court held 9-0 that the College was a recipient of funds, but ruled 6-2 that only its financial aid program is subject to federal regulations – Ed.

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and will operate differently from other educational institutions.

Most of you have heard a good deal about the role of the Board of Trustees in a private post-secondary institution, that a Board's function is to set policy and not to be involved in the day-by-day operation of the college and university. Grove City doesn't agree with that philosophy. Its Board of Trustees and particularly its Executive Committee is very active in day-by-day operations of the institution. Its Board is modeled much more closely after a corporate board than it is after a post-secondary educational Board of Trustees. It has seventeen administrators. Now by seventeen, I don't mean seventeen people who have administrative responsibilities. I mean a total of seventeen people, including the telephone operator of the college, who is included as an administrative employee; the president; the secretaries, and the financial vice president, the student aid officer. That group constitutes seventeen people. The professional part of that staff is expected to and does teach so that the administrative responsibilities are related to the teaching responsibilities. The cost of Grove City's educational program totals $4,270 per student, per year. That's tuition, fees, room, and board. That's a private institution, that's an institution which is debt-free, that's an institution whose buildings are paid for and which depreciates its buildings much as a private business organization would depreciate its capital assets. That's an institution whose graduate school enrollment record is excellent, an institution whose students receive, so far as I can tell, a first-rate academic education with a good deal of value orientation.

Now, the dilemma in which the College finds itself goes back to 1976, when about 140 of Grove City's 2,200 students received basic educational opportunity grants — Pell grants. Grove City does not participate in the Pell grant program as do so many other educational institutions. When the Pell grant program began, Grove City refused to participate in it on any basis. But at the request of the Department of Education, Grove City allowed its students to participate in that program and the alternate dispersal system. Instead of having the check come to the institution and having the students receive credit for the amount of the anticipated Pell grant, Grove City says to its students, our tuition, fees, room and board is $4,270 a year. That's what you owe. We don't really care from what source

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that money comes, nor will we give you credit for Pell grants or any other educational grant or private scholarship assistance; we expect you to pay at the start of each semester one-half of the amount due. And, if you wish to participate in the Pell grant program, we will certify yóur attendance at the college, and that our costs are $4,270. When you get your government check, you can do with it what you want, but don't forget that at the start of the semester, you owe one-half of $4,270. I suppose that there have even been a few students who bought beer with their government check. Now that would be offensive to the College, but I suspect that the Pell grant has gone for that "educational purpose" during the time that some students have been at Grove City.

Back in 1976, the federal government said to Grove City, here is an "assurance of compliance with Title IX." Please execute this form and return it to us and assure us that you not only comply with Title IX as it now exists, but that you also agree that you will comply with Title IX regulations both now and forevermore, either now in existence or which might be promulgated. Grove City replied tht it did not participate in any program which received federal financial assistance – and those are the key words in that statute – "operates a program receiving federal financial assistance." And while the College told the government that it had no quarrel with Title IX, and in fact agreed that sex discrimination is abhorrent, it repeated that it did not participate in federally funded programs and it therefore refused to execute the assurance of compliance.

In response, the federal government said under those circumstances we will commence proceedings so that all your students cannot receive Pell grants. And that they did. And an administrative law judge within the then Department of Health, Education, and Welfare said there is absolutely no evidence that Grove City has discriminated. In fact, it is very apparent that Grove City does not believe in discriminatory practices. But the Title IX regulations say if an institution receives or benefits from federal financial assistance, that means that the entire institution is subject to Title IX regulation.

Now notice the difference in the words that were used. The government did not limit its claim to an institution that receives federal financial assistance or a program that receives federal financial assistance, but expanded its claim to the institution or the program that receives *or benefits* from federal financial

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assistance. H.E.W. therefore claimed that under these circumstances at Grove City, it should uphold these regulations and terminate the assistance to students at the College.

Thereupon began the saga which continues and which will end at the end of next month, on November 29th, at 10 A.M., when *Grove City College v. Bell** will be argued before the Supreme Court. The case got to the Supreme Court in the manner you would anticipate. We began a proceeding in the federal district court to determine whether or not the decision of the administrative law judge was correct or incorrect. From that decision which was partly in the College's favor and partly in the government's favor, both the government and the college appealed to the Third Circuit Court of Appeals which sits in Philadelphia. After the case was argued, the Third Circuit Court of Appeals upheld the position of the government. Grove City asked the Supreme Court to allow it to appeal, and the Supreme Court agreed that it was a case which should be heard. The briefing schedule is virtually complete, although the college has one more bite at the apple. The college gets the last word, a reply brief which is due one week before the argument.

When the petition for certiorari was granted and the college was allowed to take the case to the Supreme Court, a good many people filed amicus briefs supporting the position which the college had taken. Many more filed briefs opposing that position. Some of the people who are writing about this case in the press or who have taken positions with respect to the arguments in this case don't seem to be involved in the same case that the college is. Many people apparently believe that Grove City discriminates against females or minorities. And that is not the case.

Grove City claims no right to discriminate and does not do so. Grove City receives not one cent of federal aid, claims no right to receive federal aid, and does not want any federal aid. Grove City, however, thinks that the student aid program was created so that students can choose among educational institutions, including any post-secondary, private or public educational institutions in this country. That ought not mean that the entire educational institution is subject to the entire range of federal regulation, particularly when the statute as adopted by

**Grove City College v. Bell*, 687 F. 2d 684 (3rd Cir. 1982), *cert. granted* (U.S. Feb. 22, 1983) (No. 82-792).

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Congress in 1972 uses the word "receipt" of federal financial assistance by programs operated by the institution as opposed to "benefit." Wrong, says the government: let those 140 students come to Grove City, let them choose that institution, give money to the students, and those events subject the institution to the entire range of federal regulations so that it cannot, any longer, operate in the efficient way that it has chosen to do and thus charge $4,270 per student, per year.

The argument ought to be fascinating before the Court because there are some other cases which have been decided over the last year or two which seem to suggest that the Court might be sympathetic, at least to some degree, to Grove City's arguments. We'll hear about one of those from Ed Gaffney, the case involving Bob Jones University. The other case is one involving the Northhaven School District and the effect of Title IX in that case where the issue was not quite the same as it is in *Grove City*. *Northhaven's* question was whether Title IX covers employers of educational institutions. The Court decided that Title IX is broad enough so that it covered employees, but in doing so, the Court used fascinating language about program specificity, whether regulation is limited to the program which receives federal financial assistance. The administration has been soundly criticized by the popular press for the notion that the federal government in *Grove City* chose to say that Title IX is program specific. Many of those who read *Northhaven* carefully think that's in fact exactly what the Supreme Court said in that case, and that one of the questions to be determined by the *Grove City* case is the definition of "program." Title IX is clearly program specific, so what is meant by a program in terms to Title IX?

Question.

Are you in court because you are not complying with Title IX or because you have not signed the form?

Response:

Only because the college has not signed the assurance of compliance. There has never been an allegation of discrimination.

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Question:

My recollection is that you argue in your brief that you don't receive government funds because you have no administrative role in the selection of the recipients. Are you making an argument by implication there that Hillsdale does receive government funds? Is your case a better case than Hillsdale's because of that reason?

Response:

I believe so. Let me just tell those of you who don't know about Hillsdale, about that institution. At the same time that Grove City is going along on its trip to the Supreme Court, so too has Hillsdale College in Michigan been under the same kind of pressure. Hillsdale, like Grove City, takes no federal financial assistance. Hillsdale students participate in the federal aid programs and in the guaranteed student loans programs. Hillsdale also has on its campus work study programs and the SEOG program. From Grove City's point of view, those programs may make a significant difference because claims can be made that Hillsdale to some degree operates those programs. As those of you who are involved with financial aid know, the claim would be that the college has some choice in who participates in those programs. The money comes to the college and the college then disperses it in return for services or because a student within that institution is eligible for funds. Grove City does not operate and does not participate in either of those programs and has deliberately chosen not to do so.

Hillsdale chose a slightly different route to test its use, but eventually it arrived at the same point where Grove City is. The Sixth Circuit found in favor of Hillsdale College, saying that Title IX is program specific. There is therefore a split between the Third Circuit and the Sixth Circuit. Grove City applied for *certiorari*, that petition was granted, and the Court decided to hear the *Grove City* case. Hillsdale also applied for *certiorari*. That petition is simply pending. Nothing has happened to it. And Hillsdale has filed an *amicus* brief in the *Grove City* case. Hillsdale's position is that participation in the aid programs does not make any difference to the outcome of the case, since colleges don't really have choice about who receives aid.

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Question:

Suppose Grove City did not accept students who were getting federal aid? Could you discriminate if you wanted to at Grove City College?

Response:

Well, as a matter of fact, we could not. There is a state statute in Pennsylvania that says in any public accomodation, and Grove City is defined as such under the Pennsylvania statute, discrimination is prohibited. But Grove City does not discriminate in any event. Grove City did not discriminate long before statutory prohibitions against discrimination. It has been co-educational since its founding. Its faculty is about equally divided between male and female. Grove City simply does not believe in discrimination. But it could not discriminate even if it didn't participate in aid programs.

Question:

Suppose you were not accepting students on federal aid but you were accepting veterans who, because of Vietnam or whatever, would be getting federal money. Would that be in the same category?

Response:

Yes. In fact, what we lawyers call *Bob Jones I* involved Bob Jones University and veterans' benefits. Benefits were given to veterans in much the same manner as some of the student loan programs are now. The Fourth Circuit decided that that receipt, the use by those veterans of those funds at Bob Jones, made the university a recipient of federal assistance.

Now *Bob Jones*, as all of us know, taints the entire area. There is an institution which at the time refused admission to blacks. Because of that, people have emotional reactions. And when they do, cases like the one Ed Gaffney is going to describe occur.

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BOB JONES UNIVERSITY: EPIPHENOMENON OR TIME BOMB?

By Edward M. Gaffney

Introduction

On May 24, 1983, the United States Supreme Court rendered its opinion in *Bob Jones University v. United States*,(1) denying tax-exempt status to a private university that maintained a policy of student discipline prohibiting interracial marriage or dating. Relying on a 1967 decision that invalidated state legislation banning interracial marriage,(2) the Court characterized the university policy as racially discriminatory(3) and denied the tax-exempt status to the university on the expansive view that all exempt organizations must serve a public purpose and must not be contrary to established public policy.(4) The Court acknowledged that "the sponsors of the university genuinely believe that the Bible forbids interracial dating and marriage,"(5) but brushed aside the issue of religious freedom by asserting briefly and without explanation that the governmental interest of eradicating racial discrimination in education "substantially outweighs whatever burden denial of tax benefits places on [the university's] exercise of their religious beliefs."(6)

In order to shed some light on the Court's treatment of these issues, this comment focuses on the parties in this case and the interests they were seeking to protect, and on the history of the legislation and litigation relating to the central theme of the case; it then hazards a prediction on the future impact of the case.

A. The Parties and Their Interests

The Court provided the following description of Bob Jones University:

> Bob Jones University is a nonprofit corporation located in Greenville, South Carolina. Its purpose is "to conduct an institution of learning. . . ,giving special emphasis to the Christian religion and the ethics revealed in the Holy Scripture . . ." The corporation operates a school with an enrollment of approximately 5,000

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> students, from kindergarten through college and graduate school. Bob Jones University is not affiliated with any religious denomination, but is dedicated to the teachings and propagation of its fundamentalist Christian religious beliefs. It is both a religious and educational institution. Its teachers are required to be devout Christians, and all courses at the University are taught according to the Bible. Entering students are screened as to their religious beliefs, and their public and private conduct is strictly regulated by standards promulgated by University authorities.(7)

The Court noted that after the 1976 decision in *Runyon v. McCrary*,(8) prohibiting racially discriminating admissions policies at certain private schools, Bob Jones University changed its admissions policy and began to permit unmarried blacks to enroll at the university, but continued to maintain the following disciplinary rule:

> *There is to be no interracial dating*
> 1. Students who are partners in an interracial marriage will be expelled.
> 2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
> 3. Students who date outside their own race will be expelled.
> 4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.(9)

As was stated above, the Court recognized that this policy was adopted because of a sincerely held religious view that regards "cultural or biological mixing of the races as a violation of God's commands."(10) (11) One need not agree with this view, and I do not share it myself. But the importance and fragility of religious freedom makes it imperative that unpopular views be protected no less than the conventional ideas of the religious mainstream.

The respondent in the case is entitled The United States of America. Normally it would be necessary to say much about this party, but in the *Bob Jones* case two observations are in order. First, the Internal Revenue Service did not spontaneously and on its own initiative enter into policing the racially discriminatory policies of exempt organizations, but was drawn into the field of civil rights through the avenue of litigation initiated by the NAACP Legal Defense Fund. Second, the

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shift in the government's interpretation of its authority over exempt organizations led the Court to the extraordinary measure of appointing William T. Coleman, Jr., formerly with the NAACP Fund, to serve as a specially designated amicus curiae in support of the position defended by the Justice Department in the Court of Appeals. In January of 1982, after the Court had already been asked by the university to review the case, the Reagan Administration announced that the Internal Revenue Service lacked statutory authority to deny exempt status to private racially discriminatory schools. Shortly thereafter the Administration sponsored legislation to remedy this alleged defect. Neither the Senate Majority Leader nor the Speaker of the House thought that such legislation was necessary. On the litigation front, the Solicitor General filed with the Court a suggestion that the case was moot, but when the Court heard that the Justice Department had already prepared a draft brief defending the view that the IRS was implementing the will of the Congress in issuing various rulings and regulations of this theme in the 1970s,(12) the Court ordered the Solicitor General to furnish the Court with a copy of this draft brief, and it subsequently designated Mr. Coleman as counsel to argue the position apparently abandoned by the government.

As a result of this highly unusual procedure, there was no agreement as to legitimacy of the governmental interests that the respondent sought to protect. Mr. Coleman argued that the Congress whether by silent acquiescence or by hints of its intention in parallel legislation, had "ratified" actions of the Internal Revenue Service relating to the exempt status of racially discriminatory schools in the 1970s, and that the fundamental interest of the government in eliminating racial discrimination outweighted the interest of the petitioner in religious freedom. The Solicitor General, with understandable awkwardness after the filing of the draft brief arguing to the contrary, continued to maintain that the IRS lacked statutory authorization from the Congress to terminate the exempt status of racially discriminatory schools, but agreed with Coleman that if the IRS has appropriate statutory authority its interests outweighed any concern for the denial of religious freedom.

This confused state of affairs illustrated not only the complexity of the public policy issue the case sought to resolve,

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for neither Coleman nor the Solicitor General clarified how the government's interest in racial integration of education is furthered by a tax policy that denies exemption to a church-operated school with a biblically based policy of student discipline relating to interracial dating and marriage. It also demonstrated the lengths to which the Court is sometimes prepared to go in order to protect its independence from the political branches, at least when it is united in the view that the Court as an institution has a distinct role in the formation and articulation of public policy. Ironically, in the very process of serving notice to exempt organizations that they must conform to "public policy," the Court managed to communicate that such conformity may not be known in advance with much clarity since public policy is not stated by the Congress alone, or by the Executive branch alone, or even by the conjoined political branches, but also by the Court interpreting the meaning of conflicting statements among various public policymakers in the political branches, as well as the inaction and silence of the legislative branch in the face of administrative action by the executive branch. It is appropriate to focus now on the interaction of the three branches of government in the developments in the 1970s related to the *Bob Jones* case.

B. Legislation and Litigation on Exempt Status of Racially Discriminatory Schools Prior to *Bob Jones*

The parties before the Court, then, were a private university represented by the same Catholic lawyer, William Ball, who argued successfully on behalf of the Amish in *Wisconsin v. Yoder,*(13) and the government represented not only by the Solicitor General, Rex Lee, but also by a civil rights advocate, William Coleman. These advocates, as well as several amici curiae, asked the Court to resolve two distinct but related questions. The first was a statutory question relating to the authority of the IRS to deny exempt status to racially discriminatory religious schools. If the Court had resolved that question in favor of the university and the Solicitor General, under cases like *NLRB v. Catholic Bishop of Chicago,*(14) it need not have faced the second question relating to the constitutional limits on congressional and administrative authority to regulate church-operated schools. The Court, however, adopted the views by Mr. Coleman, and ruled that the IRS did

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have authority to issue various regulations in the 1970s that denied exempt status to racially discriminatory schools and that to do so did not constitute an impermissible establishment of religion or an excessive burden on the university's free exercise of religion.

In order to understand this result, it is necessary to focus on the language of the statutory provisions of the Internal Revenue Code at issue, as well as the IRS regulations interpreting this provision. Section 501(c)(3) of the Code exempts the following organizations from the payment of federal income tax:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder to individual, no substantial part of the activities of which is carrying on propaganda, or otherwise, attempting to influence legislation..., and which does not participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of any candidate for public office.

Section 170(a) of the Code allow taxpayers to take deductions from their gross income corresponding to the amount they contribute to various exempt organizations. Section 170(c)(2)(B) includes within the definition of "charitable contribution" a gift to or for the use of a corporation "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes..."

In 1970 a three-judge District Court issued a preliminary injunction ordering the IRS to cease granting exempt status to private schools in Mississippi that maintained a racially discriminatory admissions policy.(15) The IRS then issued a news release indicating that it would comply with this ruling, and notified various schools throughout the South, including Bob Jones University, of its new position. In 1971, the same District Court, noting expressly that none of the schools involved in the litigation was a religious school, granted permanent injunctive relief,(16) and the case was summarily affirmed by the Supreme Court.(17) Drawing heavily on the language of this decision, the IRS then issued a more formal clarification of

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its new policy:

> Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being 'organized and operated exclusively for religious, charitable,...or educational purposes' was intended to express the basic common law concept [of 'charity']...All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.

Based on the "national policy to discourage racial discrimination in education," the ruling concluded that "a private school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in Sections 170 and 501(c)(3) of the Code."

The university was unsuccessful in attempts to procure an assurance of continued exempt status through the administrative process of the IRS. It then commenced the first stage of litigation, *Bob Jones I,* seeking to enjoin the IRS from revoking its exempt status. Persuaded by the reasoning of the three-judge panel in the Mississippi private schools case, the District Court denied the injunctive relief sought by the university.(18) The Supreme Court affirmed, noting that Section 7421(a) of the Internal Revenue Code bars a taxpayer from obtaining judicial reviews of IRS action before the assessment or collection of any tax.(19)

The stage was now set for *Bob Jones II.* Taking the generous hint dropped by the Supreme Court in *Bob Jones I* that a taxpayer might obtain judicial relief by paying an installment of federal social security or unemployment taxes, exhausting administrative remedies, and then suing for a refund,(20) the university paid federal unemployment tax totalling $21 on one employee for the calendar year of 1975. It was, therefore, in position to commence litigation again when the IRS officially revoked the exempt status of the university on January 19, 1976, announcing that the decision was retroactive to December 1, 1970. The federal district court overturned the service's revocation, ruling both that the IRS unconstitutionally abridged the university's free exercise rights, and that the IRS interpretation of the Internal Revenue Code, as promulgated in the 1970 and 1971 rulings could not be sustained.(21) That decision was reversed by the Court of Appeals for the Fourth Circuit, which adopted the view of the *Green* court that exempt

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organizations must conform to the requirements of the common law respecting charitable trusts.(22)

The other major development in case law relevant to the *Bob Jones* case was the 1976 decision in *Runyon v. McCrary*(23) that construed the Civil Rights Act of 1866 to preclude commercially operated private schools from denying blacks the same opportunity enjoyed by whites to contract with them for educational services. Although *Runyon* did not directly affect church-operated schools, shortly after this case was decided, the university altered its admissions policy, but retained its policy on student discipline prohibiting interracial dating and marriage. It was this policy that the courts found sufficiently offensive to warrant the denial of exempt status.

To bolster this conclusion, Chief Justice Burger set aside the "plain meaning" rule of statutory interpretation, according to which a reviewing court need not look to legislative history to elucidate a provision that is clear on its face. Thus when drafters of legislation use the conjunction, "or," they are normally thought to include either category in the disjunctive rather than to require both categories. In section 501 (c) (3), for example, an organization can be thought to be exempt if it is religious *or* charitable *or* educational *or* any one of the other categories listed in the statute. To read the statute in this way, however, would be to contradict the reasoning of the *Green* court and of the IRS rulings of 1970 and 1971 that concluded that an organization could be exempt only if it were religious *and* charitable, educational *and* charitable, scientific *and* charitable. In this way the statute could be viewed as importing the law governing charitable trusts, over which common law courts have had considerable authority, into the law of exempt organizations, over which legislative determinations have held sway.

This approach is flawed in several ways. First, to require that all exempt organizations be charitable ironically makes the word "charitable" redundant (a charitable charitable organization).(24) Second, it transfers the meaning of one statutory term to another employed in the disjunctive, producing a "strained construction" that "ignore[s] the disjunctive 'or' and robs the [other] term[s] of [their] independent and ordinary significance."(25) Third, it does not give effect to every word used by Congress in the statute.(26) Finally, this approach ignores the rule of statutory interpretation announced by Chief

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Justice Burger in the *Catholic Bishop of Chicago* case. According to this principle, in order to avoid the unnecessary adjudication of delicate constitutional claims, the Court should scrutinize the legislative history carefully to find an affirmative statement of clear congressional intent to regulate a church-operated school; absent such a showing of clear intent, the Court should presume that Congress did not intend to regulate.(27) In *Bob Jones*, however, this principle yielded quietly to the views that Congress can vest in the IRS broad authority to interpret the complexities of the tax system,(28) and that a decade or so of congressional silence and inaction should be construed as "mak[ing] out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings"(29) of the IRS.

Rather than limiting his opinion to this narrow conclusion, the Chief Justice wrote expansively that the "unmistakable evidence" of the framework of the Internal Revenue Code, when viewed against the background of congressional purposes, grounds the conclusion that entitlement to exempt status depends on meeting common-law standards governing charitable organizations.(30) According to these standards, all exempt organizations "must demonstrably serve and be in harmony with the public interests" and "must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."(31)

Mr. Ball argued on behalf of the university that this construction of section 501(c) (3) would subject exempt organizations to revocation of their exempt status by failure to conform with a host of public policies articulated by Congress.(32) By no means limited to racial discrimination, these policies include, for example, prohibitions against "arbitrary age discrimination in employment"(33) and the requirement that "so far as possible every working man and woman in the Nation [be assured] safe and healthful working conditions."(34) Responding to this concern, Chief Justice Burger wrote that the Court was fully aware that "determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected" and that "a declaration that a given institution is not 'charitable' should be made only where there can be no doubt that the activity involved is contrary to *fundamental* public policy."(35) Since "there can no longer be any doubt that racial discrimination in education violates deeply

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and widely accepted views of elementary justice,"(36) Burger concluded that whatever the rationale for the policies of private schools and however sincere the rationale, "*racial* discrimination in education is contrary to public policy" and "[r]acially discriminatory *educational institutions* cannot be viewed as conferring a public benefit . . ."(37)

This attempt to limit the reach of the expansive language in the opinion of the Court relating to public purpose and public benefit failed to persuade Justice Powell, whose concurring opinion notes that a troubling element of "conformity appears to inform the Court's analysis."(38) Powell reads the Burger opinion as suggesting that "the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies."(39) For Powell the purpose of the provision for exemption is, to the contrary of the Burger view, to ensure "one indispensible means of limiting the influence of government orthodoxy on important areas of community life."(40) This critique, however, appears to have had little influence in modifying the opinion of the Court, which dismissed the concurrence in a footnote as a misreading of the Court's opinion and as voicing unfounded concerns.(41)

Justice Rehnquist was the only Justice to dissent, doing so on statutory grounds; Rehnquist agreed that Congress could deny exempt status to racially discriminatory educational institutions without infringing the university's First Amendment rights,(42) but he remained convinced that Congress simply has failed to take this action(43) and hence concluded on his reading of the legislative history that the IRS lacked authority to revoke the exempt status of the university.(44)

C. The Future Impact of *Bob Jones*

Those involved with the life of exempt organizations, especially with the distinctive character, autonomy and integrity of nonpublic schools, are entitled to wonder whether the *Bob Jones* case will affect them adversely. In order to reply to this concern, one must attend to the familiar distinction between the holding of a case and expansive language or dicta contained in the opinion. As is often true of hard cases pitting important values against one another, the way the case is resolved is almost as important as the correct resolution of the case. More trouble

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or at least potential trouble ensues from careless dicta than from narrow holdings. Perhaps the most notorious instance of this generalization was the *Dred Scott* case, in which the Court went far beyond the narrow facts before it and invalidated the Missouri Compromise of 1850, thus precipitating greater friction.

Bob Jones represented a genuine conflict between important societal values, freedom of religion and freedom from racial discrimination in education. The Court ultimately resolved this conflict by concluding that there is no religious entitlement to discriminate on the basis of race in a religiously oriented school. The Court could have, and in my view should have expatiated on this theme, rather than relying on buzzwords like "compelling state interest" to justify its conclusion. It would have been helpful to have a serious explanation for the Court's stated value judgement that the religious views of a tiny handful of educators concerning separation of the races are to be given less constitutional significance than the views on separation from the secular order maintained by members of the Old Order Amish, who were granted in *Yoder* a broad exemption from the observance of an otherwise valid criminal statute requiring compulsory school attendance at least after completion of the eighth grade.(46)

The *Bob Jones* court could have resolved the statutory issue with a terse, succinct statement of its view that Congress had in fact ratified the interpretation of the Internal Revenue Code announced by the IRS in 1970 and 1971. This result may have been denigrating of the appropriate role of the legislature by rewarding their cowardice to face and resolve difficult and complex issues of public policy. But it would have been preferable than what we got, a lengthy opinion on the statutory issues full of contradictions with other precedents on statutory interpretation, and replete with dicta unnecessary to resolve the case, such as grafting of the law of charities or to the law of exemptions in a way that can only mean a larger and more activist role for the judiciary than the Chief Justice has on other occasions advocated.

It is too early to predict with confidence whether the *Bob Jones* case will have much of an impact on private education generally. If limited narrowly to its facts. the case may be epiphenomenal because there are few educators like Bob Jones who would assert a biblical basis for the separation of the races.

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To be sure, this statement does not diminish the impact of the Court's decision on Bob Jones University, which has issued a pamphlet comparing the decision to a nuclear device dropped on its campus by the Court. This pamphlet predicts:

> Shock waves from the bomb dropped on Bob Jones University by the Supreme Court will eventually reach all Christian schools, parochial schools, churches, and other American religious institutions. The same bomb has exploded the constitutional provision of religious freedom and left only toleration for religion that the government can control.(47)

The image of a nuclear explosion and its subsequent contamination is, in my view, clearly excessive. It would not be an exaggeration, however, to suggest that the *Bob Jones* case is like a time bomb ticking away with potentially harmful consequences for all non-governmental exempt institutions, including schools, even if their mission and purpose do not remotely resemble those of Bob Jones University.

In my view, the potential harmful consequences of the case are the implication that tax exemptions should be viewed as a direct governmental subsidy,(48) the diminution of congressional responsibility for oversight of administrative law,(49) and the danger of encouraging conformity rather than diversity among non-governmental institutions.(50) In order to avoid these consequences, attention must be focused on the repeated reference to racial discrimination in the opinion of Chief Justice Burger, the concurrence of Justice Powell, and the dissent of Justice Rehnquist. In addition, efforts must be redoubled to elaborate a general theory of tax exemption that acknowledges the value of the tax expenditure concept for purposes of budgetary projections and accounting without conceding the legitimacy of its statist premises, to rekindle a sense of moral responsibility in the legislative branch to assume primary responsibility for public policymaking, and to ensure that voluntary associations are not reduced to producing carbon copies of governmental programs and that they will remain free to empower people to act creatively in America's unending experiment in democratic pluralism.(51)

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FOOTNOTES

(1) 103 S.Ct. 2017 (1983).
(2) *Loving v. Virginia*, 388 U.S. 1 (1967), cited *id.* at 2036.
(3) *Id.*
(4) *Id.* at 2026.
(5) *Id.* at 2022.
(6) *Id.* at 2035.
(7) 103 S.Ct. at 2022.
(8) 427 U.S. 160 (1976). This case construed 42 U.S.C. § 1981, a provision of the Civil Rights Act of 1866, 14 Stat. 39, guaranteeing that "all persons shall have the same right to make and enforce contracts as is enjoyed by white persons," to protect the right of black children to gain admission to private, commercially operated, nonsectarian schools. The *Runyon* Court expressly reserved for a later date the question of whether this conclusion would yield in the instance of a school that maintained a racially discriminatory policy of admission because of sincerely held religious belief. 427 U.S. at 167. Two years later the Court declined to review a case in which this question was presented. *Brown v. Dade Christian Schools*, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).
(9) 103 S.Ct. at 2023.
(10) *Id.* at 2024, n.6, where the Court elaborated on the biblical basis for the racially discriminatory admissions policy of the petitioners in a companion case, *Goldsboro Christian Schools*.
(11) *See also Id.* at 2022, where the Court merely stated that the sponsors of Bob Jones University "genuinely believe that the Bible forbids interracial dating and marriage."
(12) *See*, e.g., Revenue Ruling 71-447, 1971 Cum. Bull. 230.
(13) 406 U.S. 205 (1972).
(14) 440 U.S. 490 (1979).
(15) *Green v. Kennedy*, 309 F.Supp. 1127 (D.D.C. 1970).
(16) *Green v. Connally*, 330 F.Supp. 1150 (D.D.C. 1971).
(17) *Coit v. Green*, 404 U.S. 997 (1971). Normally summary dispositions are regarding as a decision of the Supreme Court on the merits of a case, and are binding precedents to be followed by lower courts but of less authority for the Supreme Court itself. *See*, e.g., *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976) and *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). In this case, however, the Supreme Court expressly cast doubt on the precedential value of the Green litigation. See *Bob Jones University v. Simon*, 416 U.S. 725, 740 (1974).
(18) *Bob Jones University v. Simon*, 396 F.Supp. 597 (D.S.C. 1974).
(19) *Bob Jones University v. Simon*, 416 U.S. 725 (1974).
(20) *Id.* at 746.
(21) *Bob Jones University v. United States*, 468 F.Supp. 890 (D.S.C. 1978).
(22) 639 F.2d 147 (4th Cir. 1980).
(23) Note 9, *supra*.
(24) *See Jarecki v. G.D. Searle and Co.*, 367 U.S. 303, 307-308 (1961).
(25) *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) (construing section 4 of the Clayton Act, "Any person who shall be injured in his business or property").
(26) *United States v. Menasche*, 348 U.S. 528, 538-539 (1955).
(27) 440 U.S. 490, 499-504, 507-508 (1979).

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(28) 103 S.Ct. 2017, 2031 (1983).

(29) *Id.* at 2033. Chief Justice Burger primarily refers to evidence showing the failure of Congress to act on legislative proposals to overturn the IRS rulings of 1970 and 1971; the chief evidence favoring his view is the 1976 amendment to section 501 (i) of the Code, denying exempt status to *social clubs* that discriminate on the basis of race, color, or religion, as congressional approval of the IRS regulations governing racially discriminatory private *schools. Id.* at 2033-34.

(30) 103 S.Ct. at 2026.

(31) *Id.* at 2029.

(32) Brief for Petitioner at 19-20.

(33) The Age Discrimination in Employment Act of 1967, 29 U.S.C. § § 621, *et. seq.*

(34) The Occupational Safety and Health Act, 29 U.S. C. § § 651, *et. seq.*

(35) 103 S.Ct. at 2029 (emphasis supplied).

(36) *Id.* (citing case law, congressional enactments, and executive orders relating to racial discrimination in public and private education, housing, employment, and military service).

(37) *Id.* at 2030-31. See also at 2035, n. 29, where Chief Justice Burger stressed that the Court was dealing "only with religious *schools* – not with churches or other purely religious institutions . . ."

(38) *Id.* at 2038.

(39) *Id.*

(40) *Id.* In note 3 Powell refers to the tens of thousands of exempt organizations, including Friends of the Earth Foundation, Inc., and Mountain States Legal Foundation, that "illustrate the commendable tolerance by our Government even the most strongly held divergent views, including views that at least from time to time are 'at odds' with the position of our Government."

(41) *Id.* at 2032, n. 23.

(42) *Id.* at 2044, n. 3.

(43) *Id.* at 2039.

(44) *Id.* at 2045.

(45) *Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857).

(46) 406 U.S. 205 (1972).

(47) "The Bomb and Its Fallout: Bob Jones University v. United States," p. 3 (Bob Jones University: Greenville, S.C., 1983). The front cover if an official U.S. Air Force photo of a nuclear explosion.

(48) *Contrast Walz v. Tax Commission,* 397 U.S. 664 (1970) *with Regan v. Taxation With Representation,* 103 S.Ct. 1997 (1983), decided a day before *Bob Jones.*

(49) *Contrast Aaron v. SEC,* 446 U.S. 680, 694, n. 11 (1980) *with Bob Jones,* 103 S.Ct. 2032-34 (1983).

(50) *See id.* at 2037-39 (Powell, J., concurring).

(51) *See,* e.g., Peter L. Berger and Richard John Neuhaus, *To Empower People: The Role of Mediating Structure in Public Policy* (Washington, D.C.: American Enterprise Institute, 1977).

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RENDELL-BAKER V. KOHN: WHY BE A PRIVATE SCHOOL IF YOU CAN BE SUED LIKE A PUBLIC ONE

By Maxwell A. Miller

The Fourteenth Amendment to the United States Constitution provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

By its express language the amendment protects persons only against state deprivation of life, liberty and property without due process of law. It is not directed at private action. Consequently, there may be statutory but no *constitutional* restraint against private discrimination. Private institutions are theoretically free to admit or deny admission to whomever they wish, upon whatever basis they want, including religious, racial, or sexual preference.(1)

Suppose, however, a private school has become so entangled with state government as to become the state's alter ego. When that school discriminates or otherwise deprives someone of life, liberty or property without due process of law it violates the Fourteenth Amendment. The injured person can sue the school for money damages under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, or the District of Columbia, subjects or causes to be subjected, any person of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action of law, suit in equity, or other proper proceeding for redress.

In layman's terms, section 1983 means that a private school, or anyone else presumably acting with the authority of state government, can be held personally liable for abridging someone's constitutional rights, possibly including such things as dismissal without hearing or the silencing of unfavorable opinions. In recent years, it has become fashionable for students

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and faculty to sue private school administrators claiming their constitutional rights have been violated.(2) *Sheila Rendell-Baker v. Kohn*,(3) decided last year by the United States Supreme Court, is one such case.

In *Rendell-Baker* the Supreme Court held that a private school, notwithstanding heavy state regulation and subsidy, was not acting as an arm of the state in its decision to fire teachers without giving them a hearing. Chief Justice Burger wrote the opinion for a 7-2 majority. Justices Marshall and Brennan dissented.

Rendell-Baker's result is not particularly earth-shaking. Indeed, the Supreme Court affirmed both the circuit and district court decisions which dismissed the plaintiffs' case. Besides that, a number of lower federal courts have dismissed lawsuits filed against private universities by irate employees or students asserting a violation of federal or constitutional law. Thus, from one perspective, the most significant aspect of *Rendell-Baker* is its affirmance of all the other similar cases reaching the same result. Lawsuits against private institutions alleging violation of constitutional rights will, because of *Rendell-Baker*, become something of a novelty. That in itself is probably worth knowing, like knowing the last case of small pox appeared ten years ago.

From another perspective, *Rendell-Baker* simply postpones a future battle. Though the case undeniably makes it more difficult to sue private schools for constitutional violations, it does not make it impossible. If Justices Brennan and Marshall are correct, *Rendell-Baker* may have come out differently had the students rather than the teachers sued the school. (5) I think it only a matter of time before ingenious lawyers discover that loophole and try again.

Before alerting you to *Rendell-Baker's* hidden pitfalls, some background information is in order:

Civil rights litigation has become a national fad. The primary impetus for hopeful civil rights litigants is the Fees Act which gives a court discretion to award prevailing plaintiff's attorney's fees in a civil rights proceeding, usually brought under 42 U.S.C. § 1983.(6) Richard Larson, of the National Staff Council of the American Civil Liberties Union, says that recent years have seen an "explosion of fee litigation" involving civil rights statutes. In 1980, the U.S. Supreme Court rendered nine full

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decisions on fees.(7) In 1983, the United States Law Week index for general law has nineteen entries listed under attorneys' fees – civil rights.(8)

To be sure, these lawsuits have spawned extensive argument over every ambiguous phrase of civil rights laws. But it is clear that, as a threshold, a plaintiff invoking section 1983 must allege the violation of a right "secured by the Constitution and laws" of the United States. In other words, 1983 liability attaches only when it can be shown the defendant was a state actor, that he "acted under color of state law." Here the interpretive problems begin. When is someone or something a state actor? As with almost every legal doctrine, the Court has offered less than easily applied guidelines.

In 1961, the Court concluded that a private restaurant housed in a state owned and operated building acted as a state actor when it refused to serve blacks. The connection was that the restaurant and the state were said to share a mutual benefit in providing parking facilities to restaurant customers. Significantly, the Court felt that the small subsidy advanced the restaurant was not a crucial factor. Rather the decision turned on the restaurant's "symbiotic relationship" with a state agency.(9) In 1966. the Court recognized that private conduct "may become so entwined with governmental policies . . . as to become subject to the constitutional limitations placed upon state action."(10) In 1972, the Court held that "the operation of [a] regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the state in the discriminatory policies of Moose Lodge [a private club] so as to make the latter 'state action.' "(11) And in 1974, the Court held that a private utility was not a state actor in terminating service for failure to pay utility bills because there was not "a sufficiently close nexus between the state and the challenged action . . ."(12)

Armed with those rather amorphous rules, plaintiff students and faculty in the 1970's argued that private schools were responsible for alleged civil rights violations. Two of the most recently reported cases are typical. In a 1976 case, Doris Stewart, a female law student seeking admission to a better school, sued New York University for allegedly discriminatory admission policies. Her claim, brought under section 1983, was, among other claims, that the university's law school admitted racial minorities in preference to all white women, including

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her. The court proceeded under a five point analysis using similar concepts to those I have just explained, and dismissed the case. Basically it held that the connections between the law school and the State of New York were simply too tenuous, and thus Ms. Stewart had no cause of action.(13)

In a 1981 case, another law student, Ruth Rice, sued Harvard, claiming the law school deliberately gave women lower grades in violation of her constitutional rights. With a charming bit of creativity, she argued that professors pierced the cloak of anonymity in exams submitted by finding papers that used "feminine modes of expression" and downgrading them. This Court simply dismissed her claim by citing a previous case which held that Harvard is not "sufficiently intertwined" with Massachusetts so as to meet the state action requirement of 1983.(14)

That brings us to *Rendell-Baker v. Kohn*. As Chief Justice Burger framed the issue, the case decides "whether a private school, whose income is derived primarily from public sources and which is regulated by public authorities, acted under color of state law when it discharged certain employees."(15)

This case actually began as two separate actions, one filed by Sheila Rendell-Baker and the second by five of her colleagues. The defendents in each of the two cases were New Perspective School, Inc., a private nonprofit corporation, and each member of the school's Board of Directors. Ms. Rendell-Baker also added Sandra Kohn, individually and as director of the school.

In both cases, the plaintiffs filed under section 1983 alleging that they had been discharged in violation of their constitutional right to a hearing before dismissal. Basically, the dispute involved the extent to which the school permitted a student-staff council participation in hiring decisions. Ms. Rendell-Baker's five colleagues also informed the school they were forming a union, and the next day all were discharged.

In the United States Supreme Court, the American Civil Liberties Union (ACLU) represented Ms. Rendell-Baker and her colleagues in a consolidated action. The ACLU saw the issue a bit differently than Chief Justice Burger. For them, the issue was whether "an ostensibly private school, to which local governments have delegated their statutory obligation to provide public education to special needs children at public expense and which is subject to extensive state regulation, [is] subject to any constitutional constraints in connection with

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the provision of such education[.]"(16) The ACLU saw the overriding factor as the school's performance of a government obligation, namely education of maladjusted high school students, not the school's public funding or regulation.(17) Had the Court agreed, it seems logical to argue that all states having constitutions that make education a public right merely delegate that obligation by permitting private schools to operate. The ACLU seems to concede as much. Its Petition for Certiorari states "When a case concerns the state's delegation of its statutory duties to a private entity the fact that there has not been a total abdication of authority should not be a basis for rejecting a claim of state action."(18)

Rendell-Baker's significance, in my mind, is that it rejected the "public function" analysis the ACLU was pushing in its brief. Instead, the Court concluded that the state action question is not settled simply because a private group is serving a public function. Unless that function is traditionally the *exclusive* prerogative of the state, the fact "that a private entity performs a function which serves the public does not make its acts state action."(19) Three cheers for the Court.

The dissenters thought the "public function" idea was fairly persuasive and concluded: "the fact that a private entity is performing a vital public function, when coupled with other factors demonstrating a close connection with the state, may justify a finding of state action."(20) The particularly troubling aspect of the dissent is the statement that the majority "would apparently concede that actions directly affecting the students could be treated as under color of state law, since the school is fulfilling the state's obligations to those children . . ."(21) In short, Justice Marshall feels *Rendell-Baker* is simply limited to employment decisions. If the school had discharged the students rather than the teachers, the battle, and possibly the war, would have turned out differently.

I have searched the main opinion in vain to see whether the majority limits its rationale to employment decisions, as Justice Marshall says it does. True, the majority makes no distinction between actions affecting teachers and actions affecting students, but I think Justice Marshall is nevertheless wrong. The majority opinion states that "the school . . . is not fundamentally different from any private corporation whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such a private

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contractor do not become acts of the government by reason of their significant or even total engagement in performing public contracts."(22) That, presumably, would take care of Marshall's concern.

If there is a loophole, it is Justice Marshall's distinction between private contractors voluntarily performing a public service and a private entity performing a public duty.(23) It all seems to hinge upon whether education is a public obligation. Impliedly, Justice Marshall seems to be saying that decisions affecting students may have the requisite connection to the state because students sometimes have a fundamental right to education guaranteed under state law.

In 1973, the Court decided, in what has become a very controversial decision, that education is not a fundamental right protected by the United States Constitution.(24) The holding is significant because the state arguably would have a concomitant duty to provide an education to the extent that it became a fundamental right. The state would, in short, become the guarantor of education, and education would become more entrenched as a public function.

Notwithstanding the Court's 1973 pronouncement some states have made education a fundamental right under their constitutions.(25) To the extent that the state is *required* to provide a free education to all children, Justice Marshall's arguments may carry the day, especially in a lower court already inclined to favor that outcome.

Rendell-Baker is not, therefore, the last chapter in the book on 1983 actions against private schools. Frankly, I don't find Justice Marshall's arguments convincing. Even assuming the state has an obligation to guarantee special or general education, that does not make education an exclusive state function. However, if I were an ACLU lawyer, I would find myself a state whose constitution or state law made general or special education a public duty, a private school which received government funds, a disgruntled student, and start all over again.

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FOOTNOTES

(1) This observation is not absolute. There is some support for the argument that Congress has the power to reach *private* conduct under section 5 of the Fourteenth Amendment. *See United States v. Guest*, 383 U.S. 745 (1966). In *Guest*, six members of the Court specifically stated that Congress has power under section 5 to reach conduct not covered by section 1, although that is not the Court's holding. Congress also has the power to prohibit sex, religious, or racial discrimination under the commerce power. For example, Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* prohibits discrimination in matters relating to employment. The exemption for private educational institutions was changed in 1972 though still preserved for religious educational institutions. 42 U.S.C. § 2000e-1.

(2) *See, e.g., Braden v. University of Pittsburgh*, 552 F.2d 948 (3rd Cir. 1977) (trial court did not err in denying the university's motion to dismiss claiming the school was not a state actor); *Weise v. Syracuse University*, 552 F.2d 397 (2nd Cir. 1975) (sex discrimination in private university did not amount to state action under section 1983); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (no state action involved in alleged sex discrimination by Illinois Institute of Technology); *Krohn v. Harvard Law School*, 552 F. 2d 21 (1st Cir. 1977) (Harvard's denial of admission is not state action); *Stewart v. New York University*, 430 F. Supp. 1305 (S.D.N.Y. 1976); *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928.

(3) *Sheila Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

(4) The case began as two actions, *see* text at 6. One district court held against Rendell-Baker. Another held in favor of her colleagues. The action was consolidated on appeal. *Kohn* at 836.

(5) *Id.* at 851.

(6) The Fees Act, as codified in 42 U.S.C. § 1988, provides: In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(7) *Hughes v. Rowe*, 449 U.S. 5 (1980); *Maher v. Gagne*, 448 U.S. 122 (1980); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *New York Gaslight Club, Inc. v. Piper*, 447 U.S. 54 (1980); *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719 (1980); *Hanrahan v. Hampton*, 446 U.S. 754 (1980); *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980); and *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).

(8) 51 U.S.L.W. General Index 3, attorney's fees, civil rights acts.

(9) *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

(10) *Evans v. Newton*, 382 U.S. 296, 299 (1966).

(11) *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1971).

(12) *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

(13) *Stewart v. New York University, supra* n.2.

(14) *Rice v. President and Fellows of Harvard College, supra* n.2. Rice also claimed the professors downgraded women's exams as an adjustment of clerical error after their identity had been revealed. *Id.* at 337.

(15) *Kohn* at 831.

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(16) Petition for Certiorari, *Rendell-Baker v. Kohn*, No. 82-2102 (U.S. Sup. Ct. 1982).

(17) *Id.* at 19.

(18) *Id.* at 26.

(19) *Kohn* at 842.

(20) *Id.* at 849.

(21) *Id.* at 851.

(22) *Id.* at 840.

(23) *Id.* at 851.

(24) *San Antonio School District v. Rodriquez,* 411 U.S. 1 (1973).

(25) For decisions finding that its state constitution does create a fundamental right in education, *see Alma School Dist. No. 30 of Crawford County, et al. v. Dupree, et al.,* No. 77 406 (Ch. Ct. of Pulaski Cty. Ark. Oct. 26, 1981); *Somerset County Board of Ecucation, et al. v. Hornbeck, et al.,* No. A 58438 (Cir. Ct., Baltimore, Md., May 19, 1981); *Washakie Co. Sch. Dist. No. One v. Herschler,* 606 P.2d 310 (Wyo. 1980), *cert. denied,* 449 U.S. 824 (1980); *Pauley v. Kelly,* 255 S.E.2d 859 (W.Va. 1979); *Seattle Sch. Dist. No. 1 of King County v. State,* 90 Wash.2d 476, 585 P.2d 71 (1978); *Buse v. Smith,* 74 Wisc.2d 550, 247 N.W.2d 141 (1976); *Horton v. Meskill,* 172 Conn. 615, 376 A.2d 359 (1976); *Serrano v. Priest (Serrano II),* 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2 929 (1976), *cert. denied,* 432 U.S. 907 (1977); *Shofstall v. Hollins,* 110 Ariz. 88, 515 P.2d 590 (1973); *Serrano v. Priest (Serrano I),* 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187 (1971); *Robinson v. Cahill,* 62 N.J. 473, 303 A.2d 273, *cert. denied sub nom, Dickey v. Robinson,* 414 U.S. 976 (1973).

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PRIVATE SCHOOLS AND THE PUBLIC INTEREST

By Fred D. Fagg, III

I welcome you all here. You are brave to have avoided the goblins across the hall, the Halloween celebration. From observing the talent and commitment in this room, I can see private education is surely in some awfully good hands. Taking a look at the kind of folks who have already appeared, listening to the comments at dinner in reaction to some of those comments and looking at what is coming up tomorrow, I think this is going to be a marvelous encounter.

To begin, I should ask a question: is civilization in the public interest? Does private education serve civilization better or as well or even as an alternative to public education?

Starting with the first aspect, let me cite Halloween as a pretty good example of our nature. If a Halloween party attracts more attendees than an education conference, does that suggest something about values in our civilization? Maybe civilization is not in the public interest; maybe we need to define civilization.

I am reminded of the two faces of New York which I have experienced rather dramatically this week. There are many more faces in New York than the two but let me place these two in contrast to one another.

I am sure you all have at least had some encounter with the one hundredth year of the Metropolitan Opera. The celebration on public television, the simultaneous broadcast on F.M., the extraordinary performances in what was just an orgy of talent that the Metropolitan Opera was able to parade in front of all of us. Incredible! Almost from the individual who pulls the curtain open to the people who carry the lights and cover the sound, the Metropolitan laid itself out for all to see, and it was an incredible experience. One might say civilization at its finest. Certainly New York at very close to its finest.

Let me contrast that with another side, a darker side of New York civilization. I have also seen that side of New York. Being president of a private legal foundation that litigates in the courts is not much different than being dean of a law school,

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particularly a private law school, at least in one respect. I am in the habit of having my hand out, looking for the handout. And in performance of that duty, I was in New York earlier this week calling on supporters. In the process of going to New York and leaving New York I had a number of experiences with that city which make me wonder, do we really want civilization? We all take for granted the "liberties" of the street, except that thirty solicitations in three blocks is a bit much. If it did a great deal for my ego, indeed it would have done a hell of a job on my pocket book. That was in the Central Park South region. Now, we could ignore that, were it an isolated experience. But it was not. When a meeting I attended recessed I asked where the men's room was. The secretary told me I had to take the key with me. I sort of chuckled and replied, what do I need a key for? She said, well, you had better take it because there were two murdered there last week. Maybe a little bit more grievous of a crime than the ladies had in mind. And then, leaving New York at Kennedy, walking across from the TWA terminal, a beautiful terminal, a new terminal. Between the check in location and the boarding area is a bridge of glass. I just happened to glance down and a shotgun was looking up at me. And from all over, plain clothes men in a drug bust. Of course, I needn't say anything about the little plastic keys to the hotel room, and the fact that the windows wouldn't open any more than a tiny bit. And the fact that the secretaries brought purses with handles and held them inside their arms. Besides that, the cheeseburgers we had at lunch for two of us were over thirty dollars, and the room was well over one-hundred and fifty. We live with that; that's New York. The height of our civilization, some people say.

Do we really consider civilization in the public interest, and to what extent has our education system contributed to that milieu, in what obviously is a great city in this country and in this world? To what extent are we conditioned to put up with that, and to what extent do we accept that?

Kenneth Clarke in his book *Civilization* talks about how we are hanging onto civilization by the skin of our teeth. How it was almost lost.

Clarke's observation again raises the question, what is civilization? What is this thing we want in the way of freedom to have civilization? What is this equality of opportunity to have civilization? One of the things we are looking for is the opportunity to develop inside ourselves as individuals the capacity to

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appreciate the great things of our world that nature has provided us with, and that other individuals have provided us with, that our society has provided us with. We would also like to have the opportunity to make our mark, to be able to contribute to that civilization in some way. And isn't that the role then of education, whether it is public or private, to give us the capacity to appreciate what has gone ahead of us, to give us the capacity so that those that come beyond us will be somewhat more enriched? Kenneth Clarke in the book *Civilization* tells us that there were times when civilization came more to the fore, and there were times where it receded rather badly, and that at times perhaps the monks and the monasteries were the only ones carrying the word forward. Clarke makes the comment that the world grew tired of civilization from time to time; it got boring. He also makes the point that any civilized world is horrendously boring, so you are more interested in the education aspect, and are interested in helping to develop the individuals to appreciate and to contribute.

Now what is the best milieu in which to do that? Is it the public school? Max Miller in his comments earlier today indicates that one of the things we really would like to have on the private side is an alternative to the leveling influence of the public education effort, that it is easier on the public side of things to try to turn us all out in the same mold. I suspect there are some folks in the public school system that think Max is wrong. That isn't what they are trying to do and don't damn public education with uniformity. And yet, there isn't the diversity in public education that we might like, maybe because it's a student/faculty ratio standpoint. Maybe it is because we have asked public education to deal with an enormous abundance of social problems, and we have asked them to spend their resources not on education but on trying to solve these problems. Busing is a good example of the costs that can be added to an education system to address the social problem that may or may not have an educational benefit.

One could say that the purpose of this conference is to examine how a legal system may set the conditions for an alternative to a public system, which the society may feel is responsible for improving social problems in addition to educating. And we may say that a good bit of our community really doesn't appreciate the Metropolitan Opera. A good bit of our community likes the Halloween party better than conferences on private

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education. A good bit of our community really doesn't want civilization as Kenneth Carke might like. To them, the answer may well be that there are others that do prefer the finer side of civilization. Should not those opportunities be available, not simply to the top paid individuals in our society, but also to others who might like the opportunity and the exposure and the enrichment, the development of the ability to contribute and the development of the ability to appreciate. Are those individuals more likely to find what they are looking for in the public or in the private sphere?

If the public sphere is burdened with attempted solutions to social problems, how do you make it possible for a large swath of individuals coming from different economic conditions, coming from different backgrounds, to be able to pursue civilization, particularly when there is presently such a heavy pressure to shore up the public system? Interesting, it was just a few months ago that *Time* magazine was telling us how terrible the schools were in the country, and I noticed that last week they were telling us that the problems were all solved. It is wonderful for the media to create problems and get them solved so quickly for us. It does a nice thing for their subscriptions, I'm sure, but I'm not sure that the problems are much different than they were when we first read about them. Some of the problems in the New York streets are problems of education; not all, but some of them are. It may be that people who have had an opportunity to experience education are not quite so predatory upon other individuals as the average New York citizen is. It may be that educational opportunity can only develop in a private setting. I wish you luck here at this conference in helping to discover new ways through the legal system to shore up a private system, which I suspect has a great deal to contribute to the individual well-being, and therefore the societal well-being of this country.

Clint talked just a little bit about Mountain States and its role. We are a litigating group of people. We are a private law firm in a sense, a public interest law firm; and we ask ourselves the same question that I started off with. Not is civilization in the public interest, but what are the cases, what are the positions and the issues that it is in the public interest for us to support? We happen to believe that it is very much in the public interest for the free enterprise system to be supported or advocated. A lot of folks ask us, oh come on, enterprise has lots

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of people out there with lots of bucks able to put those bucks up to defend themselves. And yes, they defend themselves as individual components, but not as a system as a whole, and we see our job as stepping in when the whole system needs a voice to express that point of view.

The private property system is also one that is badly understood, and from time to time we have had to go into court to explain to folks that the private property system really needs to be supported. I am fond of using the analogy of the whales. A lot of our friends in the environmental movement bemoan the fate of those poor whales. We need a public solution to the whale problem. Well, of course the answer is that there *is* a public property system for the whales, and that is the trouble. They're public property and everybody says let's get it while we can. If the whales belonged to someone, *anyone,* they would be better taken care of than they are now. The private property system is a worthwhile system to support.

Let's look at individual liberties and individual economic liberties. From time to time our judges need a little help in understanding at least the broader perspective of limited government as it impacts upon individual liberties. We have grown up in recent years hearing that the answer to most of our problems is to deal with it in government; there is an expectation there that government will help us through. We haven't spent anywhere near the resources in recent years in fighting out free market solutions because we have had a faith that government could help us. I think there are clearly limits that were conceived initially in this country as being appropriate on government. I suppose one could say there has been a failure in government, certainly in New York City to make that city what it ought to be — a safe place to enjoy its civilization. A tolerance for a level of uncivilization that really is pretty ridiculous. We have become accustomed to it and we tolerate that failure in government and yet ask more and more and more of government.

Mountain States believes that the concept of limited government is a viable one. Clearly we cannot ask government to do anywhere near as much as we are asking it to do now. What we need to do is ask what it can do better for us than we can do for ourselves, and with respect to those things that we can do best for ourselves, it is best to let individuals assume those responsibilities for themselves.

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It is good to have you all here and it is good to have a chance to visit a little bit with you about the Foundation. I am looking forward to hearing more of the comments from the rest of you folks and to having another chance to visit with you as the conference rolls on. Thanks for being here.

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EDUCATION AND MINORITIES

By Clarence Pendleton

As I mentioned to Clint the other day during the brown bag lunch with the Mountain States Legal Foundation staff, I really enjoy sitting down and exchanging ideas with the people who do the work. I will try to put these remarks in some kind of historical perspective, focusing on post-*Brown v. Board* of 1954 with some slippage into pre-*Brown v. Board*.

During tonight's dinner, I was thinking that perhaps the public schools were the wrong institutions to be used to desegregate society in America. What would have happened if we had made a big push on housing and zoning in 1954? Perhaps we could have maintained the integrity of the neighborhood school. That is just a thought; it doesn't have any legal basis. I learned a long time ago that zoning meant what kind of defense we are playing today. But around age 38, I found out that zoning also meant I couldn't live some places. Perhaps if we could have attacked some of the covenants and some of the zoning laws, maybe we would have had a different discussion than the one we are having today. Hindsight is always 20/20! Nonetheless, I think it is a thought that I might want to give some attention to later.

We know that *Brown v. Board* was not necessarily only the beginning of the era of federal intervention into public education, but it was the start of judicial intervention in breaking down public accomodations. *Brown* said to me that we just cannot designate schools black and white anymore. It did not say that we had to have what we see today, 30 years later, a kind of judicial obsession with that "little yellow bus." And I think much of what's happened since *Brown v. Board* has changed the terrain considerably. An impatient bureaucracy and judiciary made and enforced public education laws and policies that gave priority to race balancing rather than increasing the quality of education.

This kind of regulation produced two startling situations, as I can recall. First was *Swann v. Charlotte-Mecklenberg County*, which began a real obsession with that little yellow bus. Finally,

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during the Carter years, you have the establishment of that massive bureaucracy at 400 Maryland Avenue, S.W., called the Department of Education. I think it boggles the mind to consider how many bureaucrats sit in that building. Especially as it takes thousands of people to administer a federal program contributing less than 8% of any local school district's budget. That is a lot of bureaucracy just to give 8% and a lot of regulations. I realize that there are some other things D.O.E. does, like managing the guaranteed student loan program and providing some other technical assistance to higher education. But wouldn't the dollars be much better spent with some other kind of tax program that provided money back to the individual rather than to the institutions and the bureaucrats?

The question becomes one of race balancing, has it worked? Are children any smarter? Fred Fagg mentioned that there are two recent reports, in one they say it didn't and in the next they say it did. It reminds me of a line from a play by Langston Hughes that ran on Broadway in the 50's called "Simply Heavenly." It was about this famous character, Jesse B. Simple. If you have not read Langston Hughes you ought to read the "Simple" series. It is a collection of short stories, but they really have a moral to them. One day a lady asked Simple, "Simple, how come sometimes you say 'I was' and sometimes you say 'I were?'" and Simple answers, "Because sometimes I was and sometimes I were." I think that what is clear here is that sometimes "we was" and sometimes "we were" in terms of whether or not our kids are any smarter in the public education domain.

The quality of education has not increased with race balancing. Nothing magical happens to black or white kids because they sit down beside one another in the classroom. If something magical happens, then I want to know what it is, and maybe the kids know something that we don't know anything about. But tell me, what magical thing happens after they bus people on one side of the town to the other to sit down in some classroom? Even with the massive bureaucracy and federal expenditures over a period of time we still have people that can't pass SAT tests. And I think it is important to note that we *do* have ineffective teachers and lower-achieving students. As Marva Collins said, "Mis-education is not a function of the child's race or neighborhood but the teaching methods he or she is exposed to from kindergarten on." And in spite of all

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the evidence to the contrary, the greater the influx of federal dollars, the poorer the quality of public education.

Now, I must tell you that there is no secret that I am one of the outspoken Reagan appointees. I make no bones about it. I worked for his election, and if he runs again I will work for his re-election. I think the President is doing the right things for us, and I hope he decides to make the decision to run. I think Jesse Jackson is going to decide next week that he is going to run. I don't see anything else Jesse can do but run, and I'm taking bets I am certain that he is going to do it. I have said that he should run. I think that what we should have is equal opportunity, everybody should have an equal opportunity to run for president, but the result might not be there, and there is a big difference between equality of opportunity and equality of result. I think Jesse ought to show all of us minorities that you can do it.

The President is trying very hard to eliminate mandatory busing, and I think a lot of the intervention of the Justice Department in these cases has been the right way to do these things – to try to work out conciliation agreements rather than to have so much litigation and so much money being spent through the courts. I think we can get more of a win/win situation rather than lose/lose or win/lose situation when we conciliate.

Unfortunately, many district judges are still opting for the yellow bus, but I think maybe not as many as there used to be. It should be noted that many black parents are disillusioned with the yellow bus, but they are forced to watch their kids sit on it. And many parents who are black, irrespective of income, have observed the decline in the quality of education. A lot of middle class blacks lie. I saw Walter Fauntroy, District of Columbia delegate, on television and they asked him why he sends his kids to Georgetown Day School. He is a big supporter of busing and integration of schools and etc. He said they had better integration in the private school, so therefore he sends his kids there. You can go to most of the private schools in the Washington, D.C. area, and they are pretty well balanced racially. You put your money down and take your pick. And many people have decided irrespective of what they preach that they want to send their kids to private school.

I hope that the President will do a second thing, abolish the Department of Education. I try to tell black people that they

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have an irrational obsession with the federal dollars in education. Wouldn't it make better sense now that we have more locally elected black officials than we have ever had before, due to the Voting Rights Act, if we made our plea to the state? First of all, you haven't got to send the money back, so therefore you save the cost of processing the check to send it back to state government. This is what I call "hope and trust politics" — we hope the person we want to win wins and trust that he will do the right thing. It seems to me that unless the responsibility of ruling the public domain is put back on the state or localities then we will have made a serious mistake.

Thus far the President has been unsuccessful in trying to get the tax credit legislation through Congress, but I support it and I think certainly *Mueller v. Allen* will assist in this goal. I congratulate Mountain States for having taken the initiative, and was glad to be a part of the brief at least from an *amicus* perspective.

With regard to higher education, I did read Dr. MacKenzie's letter about *Grove City College v. Bell*, and I agreed with it. The vote at the U.S. Commission on Civil Rights was 5 to 1 against sending the letter forward to the Justice Department and to the President about *Grove City*. There is no way you can make me believe that if there is a problem in the Chemistry Department, that we should cut everything off. Just like I happen to believe that there must be individual remedies to civil rights violations, and not group remedies; hence my vote in *Williams v. New Orleans*. *Williams v. New Orleans* is the case in which there were thirteen black police officers who brought the original suit against the City of New Orleans. They are no longer on the force. So why should somebody else, because he is "colored," as they say in the South, get the benefit from the case? If the thirteen persons aren't around anymore, so be it!

I am going to leave the technical part of that to you legal experts and concentrate on what I think is important for minority students. And I want to make a plea for these policies I have mentioned, saying once again that I favor vouchers and tuition tax credits. I believe this is the only alternative that will begin to establish the quality education we need, especially for minority youngsters in America. And I believe that studies will show that many black parents would support vouchers and tax credits and use this alternative to approach better education for their children; not just middle class black families, but

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also poor ones.

I also think that vouchering Title I funds is a start in that direction, but the funny thing about it is that most of the Title I money goes to white youngsters. Some 58% of the money goes to white youngsters and about 27% to blacks, and about 14% to Hispanics. I want to quote from Dennis Doyle, a good friend of mine: "Although all children in poverty are not poor students, far too many are. The impulse to give them a little bit of extra help is both humane and practical. If a sound education can help break the cycle of poverty and dependency for the long-term social and economic dividends are enormous. Even if the program is not universally successful it certainly does no harm." Title I programs are popular just like Head Start, and I think that this program should continue, even though it has some flaws. The whole matter about the school system being a beneficiary rather than the child does need some correcting if Title I is to do what it has to do or what it should do.

Let me explain. I went to school pre-*Brown*, and I went to a high school that I thought was pretty good. I went to Dunbar High School in Washington, D.C. It is a black high school in Washington, D.C. at First and "O" Streets. Let me give you a couple of things about Dunbar. Pre-*Brown*, we produced 27% of all the black Ph.D.'s in America. My mother went to Dunbar and my grandmother went to Dunbar. Charlie Drew, the first black graduate from Annapolis, and Judge William Hastings went to Dunbar. In my graduating class, three classmates went on to Annapolis, and today one is an Army Lieutenant -General and one is an Admiral. These men came from that little colored high school down there in the colored division of the Washington, D.C. public schools. We passed all of the white folk's tests, and nobody told us that the tests were culturally biased, or that we lived in such a way that the test didn't reflect how we grew up. No one told us we weren't like the middle-class kids on Long Island whose scores determined the median. We passed all of the tests. We took Latin, studied the classics, and we even took advanced calculus. With enough math and enough science, some of us were admitted to the second-year class at MIT rather than the first-year class!

I had a scholastic average of 88.94 in a class of 420 students, I was the last person in the second quarter of that class. I almost didn't get to Howard, and I had to take an entrance exam to

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get in because of my low class ranking. I knew that I could have done better, and that I was lucky to be there. But I say to you that my pre-*Brown* education is better than most white or black kids get today in the public schools. It was better, and largely because there was more parental involvement. Federal intervention gave us teachers' aides, and the bureaucrats told parents not to come to school too much because the aides were going to come in and take their place. The aides came from the neighborhood, and as soon as they got enough money they moved out. They escaped the ghetto, and then they became the "blamers" rather than the "blamed." In my time, there was more teacher interest and great pride in the school and the kinds of things that had to be done for black youngsters, and there was no federal money and there were no unions. The marketplace prevailed.

Since the Emancipation Proclamation, black people have always believed that education was the fastest, surest, and safest route to social and economic freedom, regardless of income. Nobody taught the slaves how to read and write, but a few sensible white folks taught Frederick Douglas how to read and write in the Southern mountains. The only thing I see today that's promising is the Catholic schools and Marva's place. Marva is just like the teachers in my day.

Black parents are not listening to the black leadership. The number of black children in Catholic schools has certainly increased. These are even poor black people in Newark, who are taking limited discretionary income, in addition to paying the state tax and the federal tax, and are putting their kids in private school. That is the safest, surest, and quickest route to economic and social freedom. If you thought I was going to quote from Walter Williams, I am, but only a little short quote. Dr. Williams talks about this whole matter of private education versus public education, and he says, "the real question that comes to mind is, how long is the taxpayer going to fall for the same trick, increasing the amount of tax money that is going to education? And just as important, how long is the black citizenry, whose children's chance for education is systematically destroyed, going to tolerate this condition?" And I conclude that people understand a real need for a good quality education and are prepared to make that investment.

I think we need to understand the moral superiority of the

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marketplace and allow people to have the kind of deductions, credits, or reimbursements, or as Walter says, cash redeemable certificates, that make education subject to competition. If you want black studies you can go to a black study school and see if they can compete in the marketplace. But when you go to get a job, you must be prepared. There is no such thing as a black computer, or a black data processing machine, or black money. You have to come out and make some sense in this marketplace. You must be prepared to enter the new age of micro-electronics and bio-technology, and I think these are the only avenues that will get blacks into America's economic mainstream.

And what happens in the future when the population is skewed toward senior citizens, and they exercise their power with a vote for office holders who won't tax them for supporting public schools? In San Diego, 83% of the people who pay taxes have no children in school.

With black teenage unemployment at 50%, and minimum wage laws keeping them out of work, and occupational licensing laws keeping them out of work, what else is left? It costs $65,000 for a taxi cab license in New York, and the number of licenses is restricted, when at one time you could just get an old car and write "Taxi" on the side and make some money for your family. $65,000 for the medallion, $14,000 for the car, and $4,000 for insurance, and you know you can't have any down-time on the cab because it has to run 24 hours a day to break even. A taxi cab license in Washington, D.C. costs $200, and there are more blacks, minorities, and women who own cabs in Washington, D.C., and the rates are a little cheaper. As long as we have these restrictions on the marketplace, we have very serious problems. I hope that we can implement the adequate cash redeemable certificate that would take us back to my day at Dunbar High School, where we didn't worry about race balancing and government controls and we got a good education!

We have had years to realize that federal intervention is not the answer. I will just close by saying, we must turn to the moral superiority of the marketplace to ensure a quality education for all of America's children.

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PRIVATE SECTOR EDUCATIONAL ALTERNATIVES AND THE *MUELLER* DECISION

By Clint Bolick

Before I begin I would like to introduce the two speakers whose presence graces this panel on "Funding Alternatives After *Mueller v. Allen*." Closest to me is Manny Klausner, who is a lawyer specializing in business litigation in the firm of Kindel & Anderson in Los Angeles. Manny graduated from NYU Law School, and among his many activities, he serves as senior editor for *Reason* Magazine, one of the finest, most innovative, free-market oriented magazines in the country, as well as chairman of the Committee for Educational Tax Credits. He is one of America's leading advocates for tuition tax credits.

Sitting to his left is John Coons, who is a professor of law at the University of California at Berkeley. He received his Juris Doctorate from Northwestern University and is a prolific author of numerous books, many of which deal with vouchers, including *Education by Choice: The Case for Family Control*, which he coauthored with Stephen Sugarman.

I would like to give you some background on the *Muller v. Allen*(1) case, but before I do that I would like to share an anecdote which I feel is somewhat fitting. Back in my college days at Drew University, I chaired the Academic Forum, the speakers' bureau for the school. One of the speakers was Chaim Potok, a best-selling author, and one of the fringe benefits of the chairmanship was the opportunity to chauffeur our speakers and to get to know them a bit. As I was driving Potok to Drew, I intimated to him that I would like to write some fiction myself one day, and he said "Well, I have good news and bad news for you. The good news is that you won't have very much competition, because no one knows how to write these days. The bad news is that you won't sell very many books, because nobody knows how to read these days, either."

I think that that was generally the conclusion of the President's Commission on Excellence in Education recently, the report of which exposed many of the major problems in our American educational system. But it virtually ignored a major

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solution – expanding the private educational sector and the ability of parents to patronize it.

In this light, Mountain States Legal Foundation became involved in the *Mueller* case by filing a "friend of the Court" brief. The *Mueller* decision, a recent 5-4 decision by the Supreme Court, may be the turning point in expanding private sector alternatives via tax relief. Now, what has been the Court's problem with private school tax relief? After all, it seems a fairly laudable goal to broaden the ability of parents to select the best education for their children. The problem has been the Establishment Clause of the First Amendment, which prohibits the establishment of religion and which has really been a convoluted area of constitutional law.

About a decade ago, the Court in *Lemon v. Kurtzman*(2) laid down a three-pronged test for determining whether the Establishment Clause may have been violated. Any enactment, in order to avoid being impaled by the *Lemon* standards, must have the following characteristics. First, the enactment must have a secular legislative purpose, i.e. something apart from its religious aspects. Second, its "primary effect" must be neither to advance nor inhibit religion. And third, there must be no excessive entanglement between the church and the state, and this is usually expressed in administrative terms.

The big problem for the last several years has been with the "primary effect," the second prong of the test. The *Nyquist* (3) case a few years back seemed to sound the death knell for tuition tax credits. In that case, the Court invalidated tax reimbursements for private school expenditures as well as tax grants for people who did not have any tax liability but who incurred private educational expenses. After that case, it looked like nothing in this area could survive constitutional scrutiny. The First Circuit Court of Appeals in the *Norberg*(4) case, which was decided at around the same time as the *Mueller* decision in the Eighth Circuit, caused a conflict in the circuits which brought the question to the Supreme Court once again. The First Circuit, in striking a Rhode Island program similar to the statute upheld by the Eighth Circuit in *Mueller*, said that there is a "primary effect" that advances religion if any state money at all somehow finds its way into the hands of an organization or school which is sponsored by a church. To me, that is very attenuated, but the First Circuit said that if you can trace any money in that direction, it would find that the law has violated

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the First Amendment in that it impermissibly advances and establishes religion. So we had two circuits with different decisions on tax deductions. Applying *Nyquist*, the question would be a close one.

The *Mueller* factual context had two wrinkles which distinguished it from statute in *Nyquist*. First of all, the Supreme Court pointed out that it is a bona fide tax deduction. You can only receive a benefit if the reduction places you in a lower tax bracket, so it is not a dollar for dollar decrease in your taxes and the actual effect is really pretty small. Second, the deduction is available for educational expenses in both private and public schools. Now, as the dissent in *Mueller* points out, this is not a very major distinction since 96% of the funds ultimately find themselves not only in private schools, but in religiously affiliated schools.

Mountain States Legal Foundation attacked this "primary effect" conclusion in its brief. We pointed out, among other things, that about half of inner-city parochial school students are non-Catholic. We noted that with all other factors being equal, private schools turn out a higher academic performance, and thus offer a quality educational alternative for many parents. We pointed out that the primary parental motivation for sending their children to religiously affiliated schools is not religion *per se* but is values, quality, and discipline. Finally, we focused on the word "primary," showing that even in religious schools, the students spend more time on secular academic subjects than students in private schools. As Thomas Sowell, a leading advocate of expanded private sector educational opportunities noted, if a student spends a half hour a day in a religion class, that is a very small price to pay for the education that the student may not be able to receive elsewhere.

Even though there are some distinguishing characteristics between the *Mueller* and the *Nyquist* cases, what I think has happened is simply that the majority on the Court has shifted. Justice O'Connor joined the majority which sustained *Mueller*, and Justice Powell, who was on the borderline all along, changed sides. So it is really a shift in form over substance.

There seem to be three characteristics which a legitimate tax deduction should have in order to pass constitutional scrutiny. First, it should be a bona fide tax deduction. Second, and this is not absolutely certain but it is probably a good feature, benefits should be available to private *and* public school

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parents. Of course, since public schools do not engender many direct costs to the consumers, the effect would probably be minimal. Third, the payment must be made directly to the parents rather than the educational institution which is affiliated with a religious organization. That is a very crucial factor.

There are two questions left open by *Mueller*. Now if you recall when I was discussing the *Nyquist* case, the Court not only invalidated tax credits but also the tax grants for poor parents who didn't have tax liabilities. What do we do in assisting the poor people who would benefit more than anyone else from private education? That is left unanswered in *Mueller*, but one suggestion is that these tax benefits do not necessarily have to go to the parents of school children. They can go to relatives or they can go to corporations. The Minnesota statute, of course, makes it available only to parents and guardians, but a permissible tax deduction statute could make tax relief available to people who themselves are not incurring educational expenses but who consider it to their benefit to make scholarships available, or direct payments to children to attend private schools. Making deductions available to corporations, or to relatives, or any interested people may offer a solution to that particular problem. I think that it would be constitutionally sound since Justice Rehnquist, author of the *Mueller* decision, focused on the degree of connection between the tax benefit and the religious institution, and such deductions would attenuate the connection even one further step because you have yet another person or corporation who has to make the decision on how to use that benefit.

The other unanswered question is what does *Mueller* say about vouchers? While there are really very different issues at stake, you might say that the actual pecuniary benefit would accrue to religiously affiliated educational institutions and that may get vouchers in trouble. But on the other hand, it would be difficult to say that a voucher system that was equally available to both public and private schools would have a "primary effect" problem in the first place. It would hardly be arguable that a voucher would have as its "primary effect" the establishment or advancement of religion. So it is unclear whether *Mueller* says anything at all about vouchers except this: the Supreme Court is more receptive than it has been in a long time to the expansion of private sector educational opportunities.

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Not only is the judicial climate at the Supreme Court level better than it has been in many years and something that we should take advantage of, but the political climate as well. President Reagan's tax credit program, I am informed, is not going to pass. Even such conservatives as Congressman Hank Brown of Colorado oppose it because they consider it an item that will add yet more to the deficit. Also, it may be unconstitutional in that the statute only provides relief to private school parents. Nonetheless, a recent Gallup poll shows that the majority of Americans who understand the issue favor vouchers, and grassroots support, particularly among poor people, for private sector educational alternatives is burgeoning. It looks like people are beginning to recognize that the private sector has a lot to offer, and even advocates of public education are beginning to realize that the private sector can offer very healthy competition.

The time is right for pursuing alternatives, be they vouchers, tax deductions, or some hybrid. I leave it to my colleagues to explore the relative merits of those proposals and to comment on my analysis of *Mueller v. Allen*. But the bottom line is that the time for action is now. The crisis in education has never been so widely perceived, the solutions so utterly necessary. It is now time to support the ideas that would expand educational alternatives that we enjoyed in years past but which are evaporating quickly, especially for those who need them most.

FOOTNOTES

(1) *Mueller v. Allen*, – U.S., – 51 U.S.L.W. 5050 (1983).
(2) 403 U.S. 602 (1970).
(3) *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).
(4) *Rhode Island Federation of Teachers v. Norberg*, 479 F.2d 855 (1st Cir. 1980).

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TUITION TAX CREDITS AND THE CASE AGAINST GOVERNMENT SCHOOLS

By Manny Klausner

I agree very strongly with Clint that the time for action is now. I have been attempting to stimulate such action earlier than now, but clearly our activities were ahead of our time. We tried in California to propose an initiative for an educational tax credit in 1979 and 1980, and in the course of our battle I was involved in drafting the initiative and doing a lot of the research, working with Tom Sowell and the National Taxpayers Union, people very much at the forefront of private education.

We were quite unsuccessful from the standpoint of being able to raise sufficient funds to mobilize an effort that would qualify our initiative in California. Because it is a constitutional initiative, it would require over half a million valid signatures, a task which is extremely formidable.

I mention that as part of the political background, I would like to tell you just briefly the characteristics of the intitiative that we proposed in California. The reasons for drafting it the way we did are clearer now after *Mueller v. Allen* than before.

The tax credit provided in our initiative was $1,200 tax credit per student. The initiative had four main characteristics. The amount itself wasn't so significant; rather, the first key feature was our provision that the credit would be available for expenditures in either public or non-public schools.

The second main characteristic of our initiative was that we provided that the credit could be taken not only for tuition but also for other incidental educational expenses. And that provision was challenged in an article that came out during the course of our campaign. We were adversaries of John Coons and Steve Sugarman, who were working on a competing voucher proposal. While there are certain end-results that we would like to see that are in common, today we obviously start at different points. It is clear that we had a better crystal ball than the Coons-Sugarman team because they said that our provision providing for not only tuition but other incidental educational expenses was "bizarre" and an "amateurish" attempt to avoid

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constitutional problems. In view of the *Mueller* decision, it is clear we were correct in including that provision.

The third characteristic – something that has not become an issue of constitutionality, but involves an important question of policy – allows the tax credit to be taken not only by parents or those who have dependents in schools, but by *any* California taxpayers, whether related to the student or not, as long as they incur the educational expenses of any California resident. Thus, we provided that these tax credits may be taken for any number of students – not only by individuals, but also by corporations, who could take up to 50% of their tax liability in the form of multiple credits. The reason for this was that we thought this was the most effective means of obtaining funds to provide a choice to low-income families – whose children otherwise did not really have an opportunity to elect to attend a quality private school if they did not have the financial wherewithal to opt out of the public school system. That factor we considered to be extremely useful and desirable, for reasons that I think may appeal quite readily to this audience.

The fourth feature of our initiative was to provide that no more stringent restrictions could be imposed upon private schools than those already in force. This was critical to preserve the independence of private schools from the potential threat of greater government control.

As I have mentioned, our educational tax credit initiative has not yet succeeded. It never qualified for the California ballot, and a similar version lost badly in a recent election in Washington, D.C.

Now I would like to address some of Clint's comments, and then move on to broader issues. Did *Mueller*(1) overrule *Nyquist*(2)? Clint thinks in substance yes, whether or not in form. Obviously you do have a shift in Justice Powell's position, as well as a shift in the composition of the Court. But I don't think that *Nyquist* was overruled in any meaningful way by *Mueller*. I say that because when we were drafting our initiative in California, we focused very carefully on the footnote in *Nyquist*(3) that *expressly left open the question* of the constitutionality of bona fide tax deductions or credits, in a tax system that provides financial assistance to students in a broad-based way, not just to students in parochial schools. I think that the chief factor that arises to reconcile *Mueller* and *Nyquist* is that

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Mueller upheld a broad-based bona fide tax system that not only provided a benefit to students in parochial schools, but also to students in public schools. The biggest difference, to the extent that there is tension between the two opinions, is where the Court in *Mueller* is not interested in scrutinizing the substantive impact of the Minnesota statute – despite arguments that parents of parochial school children are the primary beneficiaries. And I think in that sense the approach is certainly different from *Nyquist*. However, the biggest issue was really the constitutionality of the tax benefit as such. In determining this issue, the *Mueller* majority refused to look at which class of citizens would *in fact* enjoy the bulk of the tax benefits. Rather, the statute was upheld because it was neutral on its face in view of its availability to a broad range of people who have an opportunity to take advantage of the credit – because of its applicability to students in public schools as well as private schools. Remember, that was a key question that was expressly left open by *Nyquist*.

Now what about the differences between tax credits and tax deductions? When Clint was describing *Mueller*, he said one of the attributes that is important to preserve constitutionality under *Mueller* is that it should be a bona fide tax *deduction*. We can go further. I don't think there is a significant difference between a credit and a deduction under *Mueller*. And I don't think that there is a meaningful distinction under *Mueller* between a credit and a deduction on the one hand and a grant of money or subsidy – or perhaps a voucher – on the other hand. I don't want to steal too much of Jack's thunder about vouchers, but the reason I make these comments is to focus on the language of the Rehnquist majority opinion in *Mueller*, together with Marshall's dissent, and the quote from *Nyquist* that Marshall brings in. For example, Rehnquist talked about "scholarships made available generally without regard to sectarian or non-sectarian, or public or non-public nature of the institution benefited." He doesn't think that will offend the Establishment Clause. And then he goes on – and this is very significant language – to say that he thinks "the tax deduction adopted by Minnesota is more similar to this type of [scholarship] program than it is to the arrangement struck down in *Nyquist*." This language is very significant as buttressed also by the comments of Justice Marshall, who sees absolutely no difference in his dissent among any forms of assistance at all.

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As far as he is concerned, they are all unconstitutional. He is drawn to the same language as I am. I would like to read this brief excerpt from *Nyquist* that is quoted by Marshall in his dissent in *Mueller*:

> "For purposes of determining whether such aid has the effect of advancing religion, it makes no difference whether the qualifying parent receives an actual cash payment or is allowed to reduce the sum he would otherwise be obliged to pay over to the state. It is equally irrelevant whether a reduction in taxes takes the form of a tax credit, tax modificaiton, or a tax deduction."(4)

And I agree with Marshall about that.

Now the only caveat I would make is that Rehnquist in his majority opinion in *Mueller* does mention that if you include parents of *all* school children, doing so by means of a deduction rather than a direct grant only serves to make the state's action less objectionable. So there are grades of grants, some are less constitutional than others. But I do feel that Clint is right — the time is now. There is a very good opening that has been given to us by the majority in *Mueller*.

It is also useful to point out that there is another very significant First Amendment issue raised — which is not mentioned in *Mueller* — and that is the issue of free exercise of religion. One could raise the issue if you had particularly religious students who were coerced by mandatory attendance laws to attend public schools, whose parents do not have the financial wherewithal to send them to community parochial schools. Might there not be a serious First Amendment question by way of the Free Exercise Clause if these parents are religious and want their children to attend a parochial school — but cannot afford to do so because they are paying an excessive amount of their income in taxes to support the public school system? This is a very serious issue.

Another First Amendment question isn't addressed by the *Mueller v. Allen* controversy. If you start with the same premise again — low income students, mandatory attendance laws, parents without the financial wherewithal to send the children to private schools if they would like to do so — these students go to public schools and they are socialized there to societal norms. Is there not some tension with the First Amendment, going back to *Pierce v. Society of Sisters*?(5) We aren't talking now about establishment or free exercise of religion; we are

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talking about basically state involvement in terms of individual choice and the right to pursue an independent, non-governmental education. These are questions for which we will have to come back for another conference, but they are very fundamental questions – I think particularly so to this audience because you have a real appreciation of the advantages of private action in a free society.

I want to make one last comment about the constitutional issues and then talk about some policy questions. When we talk about all of these very complicated and difficult questions of constitutionality, we always have to step back and put it in context, asking what the parameters are of the constitutional inquiry. You start off with *Walz*(6) in 1970 which upheld the exemption of churches from the duty to pay property taxes. We are aware of no case that says it is unconstitutional to allow a tax deduction for any of us to make a donation directly to a church. If you can get a tax deduction for it – and that is not unconstitutional. If that is true, the whole controversy that rages over the constitutionality of tax credits, tax deductions, and vouchers rather pales in significance – because it is much more a direct aid to religion to allow the deduction for direct contributions, isn't it?

Let me turn to some broader issues, raising some more profound questions about civilization which go to issues of private and public education: why is it that in a free society we take for granted the idea that government must provide education? Why do we entrust to the state the very vital task of education, perhaps the most important task in a democratic and free society? And if we are willing to entrust that task to the state, why stop there? Why not entrust the rest of the important tasks to the state?

This question is one that is often not on the agenda for of us who discuss these issues. I don't think the issue involves just a question of efficiency; serious moral issues are involved. Those of us who have studied the history of government involvement in education realize that the motives of the early architects of state schools which did not charge tuition were not altogether noble, because a lot of those motives explicitly involved attempts at mind control, imposing majoritarian cultural and moral values on others, particularly immigrants, who might not have shared them.

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The arguments in favor of government schools are really not much different that the arguments in favor of state churches. Yes, we want people to share collective values of the majority. Yes, there is a very important role to be played in ensuring that we have young people brought up in what we consider the right way. But in this country we have done something that is rather unique, and it is amazing even today. We have this magnificent doctrine of separation of church and state. Even in countries in western and central Europe today that share many of our cultural ideas and our heritage, the governments tax people to support their churches. We didn't do that.

I suggest to you that it is mostly a question of expectations and what we are accustomed to. If we went back 50 or 60 years ago and had this meeting, very few people would have taken as a matter of course the notion of tax-financed government schools which don't charge tuition. It is like going back 50 or 60 years ago to zoning laws. Today, most people think you must have them, because that is the only way you can control growth in the big cities. But 60 years ago we never had a zoning law.

It is a question of expectations and what we are used to. And the attitude of most Americans, whether we start off in politics as liberal or conservative or libertarian, is one of real reverence for the idea of separation of church and state. Most of us tend to have a tremendous acceptance of the notion of minority rights, and their right to be heard and the freedom to express their views, as well as their freedom to assemble. In terms of newspapers, we realize it is vitally important for us to be informed, yet I dare say that most people in this room would be opposed to the idea of government newspapers that were tax-financed, published by government employees, and distributed, perhaps, on a basis where you were forced to read them.

Think of the reasons why you would be opposed to that. If you are opposed to government newspapers, isn't public education a far vaster power to entrust to the government? Now it is not government newspapers, but textbooks which are selected by the state. The employees are all government employees, whether federal, state, or local. They are tax-financed, obviously, and you don't get too much choice about that. Plus the government compels attendance.

This amounts to a "twelve year sentence," which is a nice way of describing the process of education in a public school

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in the United States, particularly for needy people — incarceration rather than education. I think it is also important that we do not confuse the notion of public schooling with education. As we all know very well in this room, you can go to a public school and not be educated — and you certainly can be educated without going to a public school! Even if the state didn't make you go to school at all, you obviously can be educated at home. Education is a lifelong process. We should never think that it is only the formal classroom experience that provides education to the public.

So why do we do it? Is is for the poor? If it is for the poor, why would governmental schools perform better than the private sector? Does anybody seriously think that the rate of literacy is dependent upon the tax-financing of governmental schools in low-income communities? We should also be mindful that there isn't such a thing as a free lunch. Poor families pay a very high percentage of their incomes to support the public schools. It seems to me, if you look at the operation of government schools and how they affect the poor and minority groups in our cities, the inevitable conclusion is that they ensure that we can keep the poor in "their place." When you must send poor kids to school and incur opportunity costs for twelve years, and the result is third-grade reading abilities — graduates who are functionally illiterate — we haven't done much of a service for them. The pupil and the parents are paying for it; it is not free.

Every economist will tell us monopolies are bad. Monopolies are bad in every area, and that includes governmental monopolies. They are as bad for consumers as all economists tell us. Monopolies have higher costs and they yield lower quality and less diverse services. Tax financing for a government monopoly is even worse, because you lose the aspect of accountability that is provided by a voluntary market system where a dissatisfied customer can voluntarily opt out. If a customer doesn't like an institution he patronizes voluntarily, it is easy to withdraw his patronage. Even if he is a satisfied customer, if there is a new competitor that opens up and offers a better product, he can switch. Those opportunities are lost in our educational system.

Now, I dare say if government started to finance everything kids need in this country, it would not just be education. They need food, shelter, clothing, and all kinds of services and goods;

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yet we don't single out all of those for government financing, production, and delivery. We don't do that.

So it seems to me that we should return to some of the very basic policy questions involving education, i.e. who should provide it and how should we finance it. I have been working very hard for education tax credits because I feel it is the best transitional step to get from here to where I want to end up. And where I want to end up, and I used the model of the church and the press in the United States as an illustration, is *separation*. The government has no business in a free society being involved in manipulating young minds and imposing majority values by force. Sometimes it is not even majoritarian, it may be values of the minority. The Moral Majority may not be a majority, but if it has control over the schools, we can be sure that there would be values attempted to be imposed by force.

If we grew up in Sweden today, many of us would believe that the churches couldn't survive if we didn't have tax financing. If we put that question to an American, we would have a very different answer. I suggest that we sit back and reflect on the appropriate use of government involvement in school financing. We should not take it for granted that it is appropriate. Nevertheless, it is an emotional issue, one that can be very difficult to deal with.

There was an article written by Tom Hayden, a man very dear in the hearts of many of us, no doubt, in September in the *Los Angeles Times*(7) discussing a very tough battle that was just waged in the State Legislature over whether fees should be imposed for students attending community colleges in the State of California. The issue was whether a $50 fee should be incurred. It is popular knowledge now that the State of California has budgetary problems. How should higher education be financed? Should people who directly receive the benefits of the education pay for it all?

It looked as if the $50 fee would pass as a result of a compromise that Gov. Deukmejian and the Democrats worked out. The evening that it was supposed to pass, there was a lengthy session in the Legislature, and many Democrats took what they saw as a fundamentally principled stand against the fee. Why is that? Tom Hayden's article said that "tuition-free education has been a fundamental principle for more than 70 years in California. It has been tampered with but never violated." He

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said that "many of us believe that California should be proud to be the only state still honoring this tradition, we should not be the Legislature to violate it." He concluded by arguing that "such a principle is crucial if we are to educate our under-educated and provide opportunities for working women and minorities and re-train workers for the technological revolution ahead."

I don't agree with Tom Hayden's conclusion or his premises. If we really value education for working women, minorities, and the under-educated, we should not entrust that task to the state.

What I would like to see is the funding of education the same way we fund newspapers. All of our top newspapers, the *Denver Post*, the *Los Angeles Times*, are funded the same way we fund religion in this country – on a private, consensual basis which recognizes the inherent moral bulwarks of choice and consent. Both are essential if the system is to be moral – choice and consent. No matter how strong the case is for education or religion or newspapers, it is illegitimate for the government to coerce people to finance those endeavors by taxation unless there is consent – and I mean "consent" the same way Jack Coons teaches consent in his Contracts class for first-year law students. That is where I would like to end up, that we have a total separation of state and education. I think all of us would be far better off, particularly the poor and minority groups.

Are there any constitutional barriers to privatizing education? I don't see any problems with this, even though there are some states that guarantee a right of education in their constitutions. We generally agree that there is no federal right to education. Even if there were, that doesn't mean it must be provided by the government. The right to a free press doesn't mean that the taxpayers must finance subscriptions to the *Denver Post*. The right to free exercise of religion doesn't mean the government finances the church. So we shouldn't confuse the fundamental right to pursue a particular activity with the issue of who finances it. Thus I see no constitutional barriers to moving toward education that is totally voluntarily financed. The tax credit is the most desirable approach. Tax credits are useful for people who earn money, hopefully lawfully, without the use of force or fraud in a free society. Tax credits let people who earn that money retain it and choose how it is spent

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rather than sending it to a central agency to disburse it for the individual.

Vouchers are not the same, because they conceptually involve redistribution. Money is paid in the form of taxes to a central agency which then redistributes it in the form of vouchers. It means every year you need a new budget allocation for the voucher funding. I don't feel it is as laudable to ask the government to redistribute wealth not only for people whose children attend public schools as we do today, but to redistribute income for children who attend private schools. In other words, low-income taxpayers with no children at all should not be called upon through the tax system to finance the education of the children of wealthy parents. And if you have wealthy parents who take their kids to Europe every summer, and buy lovely clothes for their kids at their own expense, education for those same kids, I submit, should also be paid for by those parents and not by the low-income people who have no kids in school at all.

Those are some of the policy issues as well as the constitutional issues I wanted to get into by enlarging the ambit of our discussion. I think that we have the constitutional openings to pursue these options. My fear is that we don't have the personal commitment. Many of us, although we understand the importance and value of private education, are still committed to the desirability and necessity of governmental education in the form of public schools. I think that is a mistake, and I urge you all to reassess your positions on that issue.

FOOTNOTES

(1) *Mueller v. Allen*, —U.S.—, 51 U.S.L.W. 5050 (1983).
(2) *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).
(3) *Id.* at 782, n.38. *See also* 790, n.49.
(4) 51 U.S.L.W. at 5055.
(5) *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
(6) *Walz v. Tax Commission*, 397 U.S. 664 (1970).
(7) *Los Angeles Times*, Dec. 25, 1983.

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THE VOUCHER ALTERNATIVE

By John E. Coons

Surely it is no accident that two California lawyers have been asked to straighten all of this out. We, of course, bring light to the benighted corners of our country, and particularly from Berkeley, whence all good ideas come. A lot of educational reform began in Berkeley. Perhaps the most notable came during my early tenure at the law school, when we delivered education in the form of tear gas from helicopters. The author of that innovation is now, of course, our national leader; very early he displayed his interest in our campus and in our intentions. I think he has always been interested in what we are doing.

My usual opener is to blast public schools for not being public. I invite the audience to look at places like Beverly Hills and Palo Alto – if they are public schools, I would hate to see a private one. These are schools for those who can afford to buy houses in the neighborhood, and the deed to their home is the voucher to the local so-called public school. It is a very attractive institution. Across the border is East Palo Alto, a broken, miserable slum, inhabited exclusively by poor and largely unemployed blacks. Their school is not so attractive, but that's the breaks.

You, however, are not the audience for such stuff, because you already know it. I hope you are outraged by that strange and indefensible system. It should not matter whether you are left, right, or center; you need only eyes to understand that this is no kind of system for a civilized community.

I have been asked, along with Clint and Manny, to talk about financing alternatives in light of *Muller v. Allen*.(1) Much has been said about *Mueller* and so accurately that I can't disagree with anything. I would add only that for me, *Mueller* gives warmth – not heat, and not much light, but warmth. It has changed the whole atmosphere in which the future of education will be debated. The ice has thawed. When you read that opinion it gives you a good warm feeling. It makes simple plain sense. It makes you feel that five people have applied their

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intelligence to the problem and done the best they could with what, I am afraid, are largely inconsistent principles from previous cases. They have made a certain amount of order out of chaos, and it is the kind of order informed by common sense. We ought not worry too much in the future about doctrine. What we ought to worry about is who it is that next leaves the Court and whom the President appoints as the next member of that institution. Forgive me if I sound realistic.

If there is a general principle in *Mueller*, it comes from footnotes and the fragments of the text of *Nyquist*.(2) Those brief remarks from that opinion that Manny quoted and a footnote which is consistent, have long given us reason to hope that the Court had reserved its blessing for systems which were "general" in the sense that they aided children whether they went to public schools or private schools. *Mueller* makes that principle all the stronger. Only 4% of the tax benefits in that case went to the parents of public school children, yet this was enough to make it a general system. The principle is powerful indeed. If it holds, we can begin at last with real hope to design systems which respond to the values of families. Unless they are devices to aid only private interests, they will be accepted by the Court, or at least have a good chance.

I do think that the more any projected system helps parents make their choices in either sector, the more likely it is to pass muster. Once that criterion is satisfied, we should simply do what we think is right. That is why the principles that I am going to advance here are as political and ideological as they are jurisprudential. We need not worry so much about cutting square legal corners for the Court as we must about creating systems plainly designed to serve the common interest.

My first principle for putting together a new kind of schooling is one which may at first strike you as a little odd in light of what I have just said. When you plan new structures, you should by all means support and defend and foster the existence of state schools. Why do I say that? I say it in the name of liberty. There is a very large number of people in this country who would like to have state schools available to them as part of the market in which they make their choices. To prohibit the state from running schools would deprive those people of a personal choice which is part of their liberty, as far as I am concerned.

It is also evident that many citizens fear that, unless there is some institution of that sort – a secular and publicly adminis-

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tered institution – the experiences that will emerge from family choice will in too many cases be intolerably eccentric. This fear of cult schools and zany experiments can be mitigated by retaining the option of state public institutions.

I am not suggesting that people would feel that way with justification. I can only tell you that this fear is a reality, an important political reality that must be taken into account in designing a system. I think it will even affect the way the Court itself will feel, when it comes at last to judge the reform under the Constitution. True neutrality between public and private sectors is crucial. It would, for example, be risky to leave the public sector relatively disadvantaged by a heap of absurd regulations promoted originally by teachers unions. Control over hiring, tenure, curriculum, and the right to charge their customers something extra are all freedoms which are generally accorded in the private sector. They strike me as freedoms that we ought also to allow to public schools. To put it generally, our object ought not be to start regulating private schools, but to deregulate the whole system and to hold out to public institutions the opportunity to be run like private schools. Eventually I will get around to describing how we might do that.

Now, we must worry about state constitutions as well. As you know, the so-called "Blaine amendments," which originated in the "know-nothing" movements in New York and elsewhere in the 1840's, are very widespread. We have one in my own state. This means that we may have to go further than the Legislature. Sadly, we may have to begin by winning a favorable construction of these provisions in state supreme courts. Failing that – or simultaneously – constitutional amendments may be sought in each state. I would urge you to think seriously about starting with the initiative process in those eight or so states – Missouri, Michigan, California, Utah, Colorado, Oregon, and so forth – that provide for it. Success at the ballot in those states could put into place the kind of system which would be protected against legislative emasculation. Having succeeded there, we would have a model by which the political process in the rest of the country could measure what choice can achieve in education.

Thus, the first broad principle is to include the public sector as part of the system of liberty. The second principle is that choice must be for everybody, not just for some. Clearly, it is

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the poor who need it most. Realistically this means some modest regulation to protect liberty of access for everybody. I know that protecting liberty through government is not a principle with which everybody here agrees. My own conviction is that the liberty of families within a system of vouchers can be assured by a minimal set of guarantees. These relate to information, admissions procedure, and the method for charging added tuition whether in the public or in the private sector.

This in fact introduces my third principle that there ought also to be maximum liberty for the producer of education. It is subordinate to the second principle – i.e. maximum liberty for the consumer – but insofar as it is simultaneously possible to provide liberty to the producer, this is highly desirable. Regulation must be kept to the absolute minimum: a fair admissions system, a "neutral" system for add-on tuition, and fair disclosure to prevent consumer fraud. All three are devices to protect family access, assuring that it is truly a free system in any pragmatic and reasonable sense.

How would one at the same time insure liberty for the producers, i.e. the schools? The best insurance is the constitutional law of the state. Again, this may be the easiest to manage in states that have the initiative process, but in any case its substance is clear. There are four major areas which constitute the central life of the school and which must be protected.

First, the school ought to be entitled to set its curriculum. Private schools today, with obvious exceptions, feel a sufficient freedom in the design of curriculum. If the present regulation of private curriculum were to become a constitutional maximum, we would have satisfied that need for freedom of the private schools.

Second, by freezing the level of control on hiring that is characteristic of state law today for private schools, we would have protected private schools sufficiently in most states. In my own state, for example, there is no regulation of hiring; constitutionalizing the status quo would satisfy the most libertarian of tastes.

Third, the control on facilities should be frozen at existing levels. In California, for example, private schools are not subject to the earthquake statues originally lobbied by the construction industry in the 1930's. In public education these have served largely to enrich the contractors. Let private schools be subject to the local safety ordinances, and freeze

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those as well.

Fourth, most schools must be in charge of their discipline and expulsion policies. This is always a tough provision to draft. No one wants a system in which the customer is deprived of access retroactively and unfairly. A just system must strike a balance between the liberty of the consumer and the liberty of the producer. My own preference is for children to have a substantive right with respect to their academic status; for example, the law might ensure the student his place so long as he is able to obtain significant benefit from the education. But the school would be in charge of deciding whether he can in fact benefit so long as the decision making process is fair. Individual decisions could not be reexamined judicially or otherwise except for procedural irregularity.

Insofar as discipline is concerned, the school would be free to announce in advance what its form of discipline is, including corporal punishment. So long as the students and the parents had notice, the school would be entitled to enforce its preferred regimen.

I think those four kinds of protections would allow the schools to be themselves, and to attract the kinds of students whom they wish to impart their brand of education, and their system of values. It would work to the maximum freedom of both the customer and the producer.

Now I will say a few words about specific devices. Vouchers and tax credits seem to be the principal topics, and I will briefly compare them. Clearly, vouchers are more help to those who need help the most. I don't have to dwell upon this; tax credits do not help people who do not have taxes to pay. Vouchers for all children could represent a neutral, general system. True, the Supreme Court found this necessary generality even within the tax deduction system of Minnesota. But I think that insofar as public schools are invited to participate in the free educational market, the system gains credibility both constitutionally and as a matter of public policy. It also gains stature as a libertarian device to assure choice for everybody.

Tax credits have additional disadvantages. At the state level a credit usually will raise a problem about the amount of revenue available in the state treasury. The total tax liabilities may very well be insufficient for the task. This would have been true in California for all the children who would have wanted to use the credit proposed by the National Taxpayers' Union.

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Second, as my colleague Steve Sugarman has shown, for the same benefit, tax credits would have to be much larger than vouchers. This is a serious flaw in the pragmatics of the system.

Third, since tax credits do not help low-income families, they tend to leave them stuck in public schools. These in turn are presumably worse off by the departure of those who are using their tax credits to go to private schools.

Fourth, the NTU's notion of third-party payments on behalf of children seems to lack any rationale. For a corporation to decide that Johnny Smith is the right person to go to Holy Cross High School is bizarre. Why is some corporate executive to decide for that child instead of the child's parents? Should we not be concerned with the question of who is the best decision-maker for that child? Is it some stranger sitting in a corporate office, or the parent who knows the child? For this purpose I don't see any great advance in preferring a hamburger king or a bank president over some bureaucrat in Sacramento. As a decision-maker for the child, either stranger is equally absurd.

Third-party decision-making is also an invitation to bargaining and corruption. Selling tax credits back and forth between families that have and do not have children is not a particularly inviting use of otherwise public funds. If the motive is to stimulate gifts to education, we ought to continue to use and perhaps expand the use of the unrestricted gifts to charitable institutions rather than earmark gifts on behalf of individually named children.

A fifth disadvantage is that tax credits for education tend to hurt other important institutions in our society such as hospitals and churches. The incentive for giving would be powerfully directed toward education and away from these other institutions.

Sixth – though this is disputed – I personally believe that tax credits will hurt public schools. That plausible threat is a political liability, as demonstrated by the debacle in the District of Columbia where tax credits lost by an 8-1 margin.

Finally, and importantly, tax credits offer no opportunity to deregulate the public sector such as vouchers could do.

Now, what do we do? What should we be working for? We ought to be promoting experiments at federal level, where existing money can be used for different forms of choice including scholarships, BEOG's, vouchers, etc. Indeed, in the

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case of children failing in the public schools, even Albert Shanker has endorsed this principle. Perhaps they could be promoted as "Shanker vouchers."

At the state level, constitutional initiatives should be pursued in those states that I have already mentioned. In appropriate legislatures, the Minnesota proposal is most attractive; it would provide vouchers to all families in the bottom 25% of the income scale. I think it would even be useful in some states to think about vouchers for public schools only; this would be sensible where the constitution is not easily amended, thus limiting choice for the time being to the public sector. You can imagine creating a public school voucher system in which each school could go bankrupt if it didn't succeed, and in which managers and employees would pay for their inefficiencies. Such a system is not my style, but it is better than nothing. Of course, as I have said, I would also support tuition in public schools under any of these models, but only so long as it does not disadvantage low-income families. It must meet the *Serrano* criterion; that is, publicly supported education ought not be dispensed according to the wealth of the family.

There are also two ways in which litigation might help choice. One is a long term campaign for what should be called "Arons vouchers." Stephen Arons of the University of Massachusetts has long argued that under the First Amendment, the dissenting family ought to be permitted to escape public education; that is, when public school becomes a form of ideological entrapment, it violates the intellectual liberties of parents and children. Next, having escaped compulsory education in the public sector, Arons would have the refugee student invoke equal protection to secure his share of the tax pie for education of his choice. Success, if any, in this direction is a long way off, maybe 50 years. Nor is it clear that the courts could properly manage the equal protection aspect. Yet the general idea ought to be nourished by institutions such as the sponsor of this conference. That case ought to be lost and lost again until one day parts of it succeed. Perhaps in stages it could be won in a big way – if, in the fullness of time it seems worth winning.

There is a more modest but important possibility. A number of academic lawyers have begun to consider the capacity of the Civil Rights Act of 1868 to provide choice for a significant number of children around the country. These are pupils in all-minority ghetto schools located in districts that are presently

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under desegregation orders. Denver, Dallas, San Francisco, and Detroit are examples. Detroit has long been under a court order to desegregate, but there are still all-black schools. A child in such a school may intervene and argue that this school district is in violation of his individual rights. He is the victim of a constitutional wrong, and section 1983 of the Civil Rights Act appears to support a claim for damages. The court has retained jurisdiction, and no elaborate factual showing is necessary. The child asks for damages sufficient to permit his transfer to the private school down the street, where his presence would have an integrating effect. Or he may seek entry to a public school in another district where his presence would have an integrating effect. What would a court say to such a proposition? Would it be able to say, "No, you can't go because you live here and you must stay in your own school district even though it is violating your right to a 'desegregated education'?" It would be hard to imagine a more embarrassing outcome for the judicial system. Indeed, to the contrary, it would represent an inviting proposition for a Supreme Court looking for a way to do something about integration without compulsion. Here is an opportunity for gentle judicial intervention which at one stroke provides voluntary integration and improvement in the quality of that child's education.

My closing advice is to take the middle of the road and stick to the political process where possible. My judgment on such matters is generally bad, but there's always a first time, and some people learn by mistakes. The crucial initial task is to put a sensible and moderate proposition for family choice on the ballot. The polls over the last five years consistently suggest that choice can win. I hope you agree that it would be worth winning.

FOOTNOTES

(1) U.S. 51 U.S.L.W. 5050 (1983).

(2) *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

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THE REAGAN EDUCATION AGENDA

By Hugh Joseph Beard

I'm here to discuss the Reagan agenda in education. We have heard of the decisions and work that the Reagan Administration did in the *Bob Jones* case, the *Grove City* case, and the *Mueller* case with respect to tax credits. My speech is now somewhat like putting on a production of Hamlet without the Prince; you have taken the most salient points and then you leave me with the rest.

These other points are somewhat more technical but are nevertheless interesting. There were about five federal programs before 1981 which assisted the private schools: Chapter I, or then known as Title I of the Elementary and Secondary Education Act of 1965; Titles II, III, and IV of the Elementary and Secondary Education Act of 1965; the Education of the Handicapped Act; the Vocational Education Act; and the Bilingual Education Act. In 1981, the Reagan Administration proposed several changes in these acts. I'll discuss those changes as well as the recognition by the Reagan Administration of the strengths of private schools that is reflected in the Report of the Commission on Excellence, and since no one else is discussing it, the agenda for education that is not that of the Reagan Administration but that of the Washington establishment. My subtitle to that part is "A Word to the Wise."

The Reagan Administration's Education Initiatives

First, I will address those federal programs assisting private schools before 1981. The Education Consolidation and Improvement Act of 1981 had several effects. First, the Act streamlined the Title I provisions into what is now called Chapter I of the ECIA. Second, it made several changes in Title I with respect to programs in which private schools could participate. Now, for those of you who do not know what Title I is, it is the federal government's program to provide remedial reading and remedial math assistance for disadvantaged children. A good number of parochial schools have participated in Title I

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programs over the years, primarily inter-city parochial schools. We always wonder whether these programs do much good, but the federal government spends about $2.5 billion a year on this program. About eighty per cent of the studies which have been commissioned by the Department of Education in the past 30 years have shown that the Title I money has largely been wasted. However, nothing much has changed, and private schools can still participate. This participation, even by parochial schools, has been declared legal in the case of *National Coalition for Public Education v. Harris*(1) and is considered lawful by the Department of Education.

The second change in 1981 was in Chapter II. We consolidated about 30 programs from Titles II, III, and IV of the Elementary and Secondary Education Act into one block grant. This action repealed a good number of previous "categorical grants" and provided that states will get about $500 million which they may use largely as they see fit. The Congress did, however, make it very clear that the states had to spend a right good amount of that money on private schools. Specifically, § 586 of Chapter II states that private school students must receive benefits and services consistent with their representation in the school operation. In the event that activities being funded are deemed not feasible for or needed by particular private school students, other arrangements must be made by the state to ensure the equitable participation of private school students in these programs. In the event that no Chapter II activity is being carried out by the local education agency, the state education agency must make arrangements to provide benefits and services to private schools to the extent that would have occurred if the local education agency had received some funds for expenditures for private school students. If a state has some provision in its laws or constitution that does not allow it to assist private school students, the Secretary of Education will arrange for these services for private school students in that state directly. There have been no changes in the Education for the Handicapped, Bilingual Education, or Vocational Education Acts with respect to private schools.

However, one proposal has been suggested recently with respect to the Education of the Handicapped Act. At the present time, parochial schools and other private schools in some states are not allowed to receive the benefits for their handicapped children under the Education for the Handi-

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capped Act. Senator Eagleton of Missouri has proposed a law which would allow the Secretary of Education to provide these services directly. This is similar to the procedure in Chapter II described earlier. It is triggered by a state education agency advising the Department that the state is prohibited by state law from providing private school students the services of EHA.

Another change that has been suggested is the idea of vouchers for Chapter I. This was proposed in March, 1983 by President Reagan. The proposal would provide a voucher of approximately $525 per student to each student who meets the requirements of being economically and socially disadvantaged. The way the voucher proposal would work is this: the $2.5 billion that the government presently gives would be allocated to the states, basically by the proportion of school age students who are disadvantaged and living in those states. The states would allocate these funds in a similar manner to local school districts. The school districts that get Chapter I funds would have the option of using part or all of these funds to provide vouchers to the parents of educationally disadvantaged children. States could, however, require that all school districts establish voucher programs. The amount of the voucher would depend on how much the state school district was authorized to spend on compensatory educational programs and the number of students eligible to receive vouchers. This amount could be $525 under present funding levels. Parents could use these vouchers to enroll their children in private schools, in public schools outside their own district, or in compensatory education programs in home districts as a supplement to the public school or the private school within the district. Districts opting for the vouchers would be required to continue providing compensatory education services for voucher recipients who chose to remain in the district schools and for any Chapter I students, i.e., disadvantaged students, who did not receive vouchers. The local school districts would have to tell the states how they were going to run their voucher programs, but this proposal would not be subject to approval by the Department of Education. However, the voucher could not be used in a school that discriminated on the basis of race, color, or national origin; but for purposes of Title VI or Title IX (the *Grove City* fight), this would not be considered federal financial assistance. The voucher proposal for Chapter I is one of the more interesting proposals that have been part of the Reagan agenda.

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The Commission on Excellence

The Department of Education has also appointed the Commission on Excellence. Much of the report of the Commission on Excellence could have been produced by the people sitting around this room in an afternoon. We might not have been able to have come up with some of the better phrases, but the basic findings were well-known to almost everyone who had looked at public education, and American education in general, over the past 15-20 years. However, these observations have been considered big news in Washington, New York, and the national media. The Report did, however, suggest that some of the things which private schools have been doing for the past 200 years should be the basis for reforming and reviving the public schools.

The Report suggests that the public schools should emulate the private schools within certain areas. It suggests that academic content should be improved. It points out that the secondary schools' curricula have been homogenized, diluted, and diffused to the point that the curricula no longer have a central purpose. In effect, the public schools have a cafeteria-style curriculum, in which the appetizers and the desserts can easily be mistaken for the main course. In addition, the Report found that the public schools should emulate the high expectations and high standards imposed by private schools, particularly for minority and disadvantaged children. It states that the public schools should define expectations and levels of knowledge, abilities, and skills graduates should possess. It refers to hard work, behavior, self-discipline, and motivation that are essential for superior school achievement. Such expectations are enforced by grades, graduation requirements, entrance examinations, and difficult subject matter. Somehow the Report does not sound like a description of progressive education in the 1960's.

The Report says that in many schools, time spent on learning how to cook or to drive counts for as much toward a high school diploma as time spent studying Mathematics, English, Chemistry, U.S. History, or Biology. It found that some schools provide students only 17 hours of academic instruction during the week and the average school provides only about 22 hours. On the subject of discipline, the Commission suggests that the burden on teachers for maintaining discipline should be reduced through the development of formal codes of student conduct

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that are enforced consistently. Private schools learned this a long time ago. It suggests there are too many administrative burdens on teachers. It observes that these burdens have reduced the time for teaching and learning. It suggests there should be ability grouping, with promotion and graduation guided by individual academic progress rather than by rigid adherence to age. It recommends that teachers should be competent, that they should know something about their academic discipline. The Commission contends that the teaching profession should be professionally competitive, market-sensitive, and performance-based.

That's what the Reagan Administration suggested should be going on in our nation's public schools. The President proposed these things not for Congress to resolve, because it is the position of the President that education is primarily, if not exclusively, the concern of the states, the localities, and last but certainly not least, the parents. Therefore, the President has not proposed any thorough legislation, and indeed the Administration has opposed federal legislation which would attempt to impose these standards. We suspect that any federal legislation, no matter how well-intentioned, no matter how well-drafted, will work to the detriment of the education of children.

The Agenda of the Washington Establishment

I also want to bring up some other proposals that are not on the Reagan agenda. These proposals are on the agenda of those people who compose the permanent establishment in Washington. Those people will be there in Washington when I am gone, when Reagan is gone, and they will still be trying to build upon the Potomac their latest version of Babylon. Their agenda is Washington's true agenda for education.

Washington's agenda is a hindrance to both the private and the public schools. It affects the public schools more than the private, but I want to make clear that this agenda will be applied to the private schools ultimately if Washington gets a chance.

We have in the Education of the Handicapped Act a requirement that applies to the public schools in 49 of the 50 states,* the District of Columbia, and various insular possessions. It requires that if a local school district enrolls a handicapped

* Now 50. New Mexico recently submitted.

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child – that means not only blind, hard of hearing, and crippled, but also mentally and emotionally disturbed – that child must be educated with all the rest of the students. Now that's probably good for the handicapped child if he is mentally or emotionally disturbed. Many times, it's hell on wheels for the regular kid.

Second, we have a requirement that a local school district cannot change the placement of a handicapped child without either the permission of the parents or a long legal process. Many advocates for handicapped rights contend that a local school district cannot take out a disruptive handicapped child who is a serious disruption to his class. If an emotionally disturbed kid attacks another kid with a knife, the principal probably cannot permanently remove him from the school, or even from the classroom. This requirement will cause and has caused considerable trouble in discipline in public schools. Watch out if it ever gets into private schools.

All public schools are required under 20 U.S.C. § 1405 to provide affirmative action in hiring handicapped teachers. Now while it may help the handicapped children to have a handicapped teacher, the logic somewhat escapes me, particularly when you realize that it doesn't necessarily help a deaf kid to have a teacher in a wheelchair teaching him. This teacher does not provide a role model. Further, the Act imposes other duties upon teachers. For example, a teacher must make certain his deaf kids' hearing aids work. These extra duties, it seems to me, take away from the teaching of normal kids.

There are several instances in the Education of the Handicapped Act which provide that if schools undertake to educate handicapped children and receive asssitance under the EHA, these schools are considered subject to the EHA.

In addition, there are three statutes which are very similar to each other. They are Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and § 504 of the Rehabilitation Act of 1973. These say something like this: No person shall be subjected to discrimination on the basis of "blank" in any program or activity receiving federal financial assistance. This is the subject of the *Grove City* question. Now the "blank" can be for race – Title VI; sex – Title IX; or for handicapped – section 504. These laws apply to hiring of teachers and staff as well as to the treatment and admission of students. If a private school accepts some of the

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assistance under Chapter I, Chapter II, EHA, Vocational Education, or Bilingual Education, the school is a recipient one way or another of federal financial assistance. I don't think many people are interested in discriminating on the basis of race. However, Title VI goes far beyond what anybody ever considered to be discrimination on the basis of race.

Now private schools probably aren't accepting this aid but they might, and private schools may find themselves tempted today to look into this. First, take a look at Title IX. Private schools are not allowed to have sex stereotyping in their curriculum. That is, schools can't show little girls in the kitchen and little boys on a football field. Schools can't have sex stereotyping in counseling. Counselors can't say, "Well, Charlie, you might not do well in Home Ec. You might not feel that's your cup of tea." You cannot say, "Well, Julie, you can sign up for welding but I think you might do better to learn Home Ec. or music." Schools cannot even suggest under these statutes that there are such rules that society has developed. I don't think anybody thinks that girls should be prohibited from taking shop or boys from taking Home Ec., but many people have suggested that it is not lawful to advise students of the roles that society has traditionally adhered to. The question is whether the government should prohibit it, and under Title IX, the government does so. In athletics, there can be no policy which has the effect of discrimination. Schools cannot even discriminate on the basis of pregnancy.

Now there are a couple of other things. Title IX specifically does not apply to religious institutions. That's under 20 U.S.C. §§ 1681-83. However, the local education agencies are not religious institutions. They are covered and they are required to police the private schools that are receiving Chapter I, Chapter II, and EHA money through them. These local school districts are required to see to it that they comply with Title IX. Another question that always comes up – schools are not allowed to discriminate in discipline or to have any disciplinary rule that has the effect of discriminating on the basis of sex. What happens when a school is disciplining more boys than girls? And in my own recollection of junior high school, boys were considerably more rambunctious and in need of discipline than the girls.

Other questions arise, such as are private schools required to provide an interpreter for the deaf? The public schools in 49

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states are required under the EHA to provide an interpreter for the deaf if the child needs it. Are the private schools required to also do so? Is language a form of national origin discrimination? Is it legal to require that a child speak English to be admitted to a private school? What about testing? A decision of the Supreme Court said that language discrimination is a form of race discrimination. Is there an obligation by the private school which receives federal assistance to provide extra services to limited English proficiency students? Are schools required to provide bilingual education, i.e., education in the child's home language? Or can private schools simply say that they are teaching this child in English, period?

Discipline questions – the Department of Education is presently requiring some school districts to provide statistics broken down by race. The immediate question there is if a large number of a school's discipline problems are black students, is that school discriminating if it is disciplining more blacks than whites? Can a school use ability grouping, and to what extent can it use standardized tests to do so? The State of California, from whence cometh all good things, gives us *Larry P. v. Riles*.(2) It prohibited the State of California from using standardized tests at least for the purpose of putting people into slow learner classes and educable mentally retarded classes.

A final question – competency testing. Are schools allowed to use competency testing for teachers or for students? There the government used to have the Emergency School Aid Act. Now, this was in effect between 1972-1981 and was replaced by the Reagan Administration block grant. It has been proposed for re-enactment. It would mandate that a school cannot use competency testing if the test serves to demote black teachers or black students – particularly teachers. If it has a differentiation of 10%, that is a violation of the Act. For example, if a school has a competency test for teachers that causes a demotion of 21% of the blacks and 10% of the whites, this is considered presumptively a violation of that statute.

The final point which I will suggest is this. The definition of "assistance" is very broad in Washington. The Congressional Budget Office, the Joint Committee on Taxation, and before 1981, the Office of Management and Budget consider federal assistance to include all forms of "tax expenditures." For example, they would include deductions given to a 501(c) (3)

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school, deductions for child care, deductions on gifts to churches, to be assistance to schools. They consider it a tax expenditure that scholarships and fellowships are not considered income. I would suggest that these are some of the ideas that are floating around Washington as means by which to ensnare and capture the private schools.

FOOTNOTES

(1) 489 F. Supp. 1248 (S.D.N.Y. 1980).
(2) 495 F. Supp. 926 (N.D. Cal. 1979).

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PRIVATE EDUCATION AND THE ROAD AHEAD

By Edward M. Gaffney

Crystal ball gazing is always a risky proposition, and when I was asked to put together remarks about the road ahead for private education, two thoughts struck me. First of all, the indeterminancy of the future, the fact that none of us here knows how things are going to fare concerning either equitable financing of education that provides adequate freedom of choice or the extent to which regulatory power of government over the educational process will increase or decrease. On the other hand, I accepted the responsibility of talking about the road ahead because of the constructive image of road-building that suggests a lot of effort and forward movement, which has to occur before we will get in a position that seems from our perspectives to be an optimal one.

The eminent paleontologist, Pierre Teilhard de Chardin wrote in his diary, *The Future of Man*, that everything he had learned from his science about the distant past of the human species kept reawakening within him a sense of urgency for creating hope in our future. He said it is strange that some historians treat the past as only the future deserves to be treated. In short, we can reflect back on our own experience and that of the courts and the legislative bodies that are active in this area and discern some signs that point a different and perhaps brighter future for educational freedom.

On behalf of the conference participants, I want to say a word of gratitude to the sponsors and organizers, because not enough thought and considered reflection has been given to this theme. I think that accounts for some of the mess that we're in.

I would like to begin by highlighting the impact that federal spending has had on education with respect to regulation. More than two decades have passed since a distinguished federal commission composed of eminent leaders in higher education, in that the dawning era of federal aid to education, filed its report in 1952 warning that regulatory conditions attached to federal aid would result in uniformity and mediocrity in American education. In 1983, the Court does not suggest that uni-

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formity has become the standard in American education, but it did use that famous metaphor, "the rising pool of mediocrity." The only way to forestall the drastic result of uniformity and mediocrity, suggested the commission in 1952, was for institutions across the board to decline federal financial support.

This conclusion had an ancient parallel in Homer's *Iliad*, which I had occasion to read a year ago last summer. The priest of Apollo urged his people not to accept the gift of the Greeks. The popular response to this warning is prophetic of the general reaction to the Commission's prediction of 1952. Since 1952, federal aid has of course become an essential component of education, and virtually every institution that I am aware of, at least at the higher education level, accepts federal aid. A recent survey that I conducted of administrators of church-related colleges disclosed that as of 1978, some 86.9% of the respondents received some form of federal assistance and all admitted students entitled to receive some form of federal benefit, whether in the form of a grant or a loan. As we've heard this morning, that suffices in the bureaucratic mindset in Washington to constitute federal financial assistance and to trigger off the regulatory apparatus that comes with recipient standards. It is likewise obvious that the Congress has not recognized an absolute immunity for educational institutions, and rather has at least tacitly approved the expanding reach of governmental regulation.

Several leaders of higher education voice strong criticism about the reach of regulations in campus life. The presidents of Harvard, Yale, and Brigham Young, for example, have all made common cause in suggesting that the federal government is offering their institutions a new version of the Trojan Horse. There is no need to review on this occasion the various statements of the presidents of those institutions. Many are familiar with the basic thrust of their message. It is not necessary either to rule out all the counter-arguments made by thoughtful commentators such as Robert O'Neill, the current president of the University of Wisconsin, and Professor Bill Kaplan at Catholic University, who have urged that the complaint about the federal regulation of higher education has been overstated. They warned that the danger in crying wolf may be more and more regulation rather than less. It is enough to recall the debate, as well as to repeat Professor O'Neill's emphasis on the importance in this highly sensitive area of dealing with what is

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rather than what might be. Thus, all of my comments are based on actual regulations that already exist.

First, I want to trace a general fear about constitutional law as a way of shielding the private character of private education, which exists under three rubics — academic freedom, associational freedom, and religious freedom.

Academic Freedom

There are two distinct senses in which academic freedom has come to have constitutional significance. First, it is a handy phrase that sums up the protection of an individual professor or a group of professors against unreasonable incursions by other members of the college community into the professors' independence in research, publication, or teaching role. That includes the content and method of teaching performance, and also protects to some degree the civil rights of a professor as a "citizen of the world," referring to "extramural utterances" as they are called. Those are things that a professor says off-campus. The classic articulation of this concept of academic freedom remains the 1940 statement that was issued *jointly* by the American Association of University Professors and the Association of American Colleges. That point may be a small one historically, but I think a significant one. That is, it is not just professors who have an interest in protecting academic freedom, but also the institutions themselves. This statement of principles has been applied to concrete disputes through the informal structure of private government within the academic community. On occasion, courts have relied on this body of private law, so to speak, that is customary in character, in adjudicating claims concerning violation of academic freedom.

Yet another instance of a use of the academic freedom principle can be found in the *Tilton*(1) case in 1971, which dealt with the permissibility of providing funding to church-related colleges and universities. The Court suggested that if the institution was characterized by a high degree of academic freedom, it would not label that institution as "pervasively sectarian," whatever that means, for purposes of the First Amendment. Although the Supreme Court has never elevated academic freedom to the status of an independent constitutional right granted explicitly by the First Amendment, it has frequently asserted that academic freedom is a significant value

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that must be given serious consideration in the adjudication of cases involving the rights of professors.

There is a second aspect of academic freedom that has emerged from a series of cases. *Dartmouth College*(2) involved the interpretation of a charter granted in the pre-revolutionary period by the Tories, although the last thing we would expect is that after the break from George III that we'd have federal courts using the Contract Clause of the United States Constitution to defend a charter granted during the pre-revolutionary period. But that was exactly the argument in *Dartmouth College*, due to the persuasive, eloquent, and masterful oral advocacy of Daniel Webster, who represented the institution. He saw the attempt of the governor and the state legislature in New Hampshire to alter that charter as a significant inroad on the independence of that institution. When Webster concluded his argument – "it's a small college, but there are those who love it" – there were tears flowing from Chief Justice Marshall's eyes. He then went on to write this historic opinion that provides the fundamental distinction between institutions that are owned, operated, and controlled by the government for educational purposes and those which remain, at least in some sense, private though obviously for a public benefit. It is not common today to rely on *Dartmouth College*. Nonetheless, the distinction remains there, grounded in our legal history in a very significant way.

The main cases arise in our century. You know them: *Meyer v. Nebraska*(3), *Pierce v. Society of Sisters*(4), *Epperson v. Arkansas*(5), and *Wisconsin v. Yoder*(6). Let me say a word or two about each.

Meyer v. Nebraska invalidated state legislation prohibiting the teaching of the German language. *Pierce* overturned the initiative process, through which the people of the state of Oregon amended their constitution to say that all education would be governmentally controlled; i.e. you had no freedom of choice whatever about the kind of schools to which you would send children. But the Court, using the property aspect of the due process clause, unanimously reversed that decision. Here, ironically, it is the people of the State of Oregon that voted democratically to eliminate choice. And we have the hierarchical institution, non-democratic, anti-majoritarian Court, that intervenes to say the State cannot do that. Even if the vast majority of the people of Oregon want to do that, it violates

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the Due Process Clause, and we are not going to tolerate it.

In *Epperson v. Arkansas*, the efforts of that state to deal with the doctrine of evolution by making it illegal to teach it in any school in Arkansas. Primarily invalidating that statute as a violation of the Establishment Clause, it is the only instance that I am aware of in which the Supreme Court has done so under the "secular purpose" test. The Court concluded that it did not have the valid secular purpose; i.e. it was designed to promote the particular tenets of a particular religion. Nonetheless, in doing so, the Court was actually protecting academic freedom. It never used the phrase, nor did it do so in *Meyer, Pierce,* or *Epperson*, but nonetheless, it contributed to a body of law that set limits on governmental control of curriculum.

In *Wisconsin v. Yoder*, the Court did not explicitly use the phrase "academic freedom," but it did assert limits to the monopolistic and exclusive control of the educational process by the government, at least where there is a religiously grounded reason for people declining to participate in the state-owned and operated schools.

The fundamental character of academic freedom is a safeguard against governmental thought control. It is stressed in a famous *dictum* of Chief Justice Warren in *Sweezy v. New Hampshire*.(7) He said:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straitjacket upon the intellectual leaders in our colleges and university would impair the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made . . .Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always be free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate.

The *Sweezy* case involved a broad-ranging investigation of state university professors conducted by a so-called "legislative committee of one," namely the Attorney General of the State. He called Professor Sweezy before him to answer a variety of questions concerning his personal life, academic career, political opinions and beliefs, and memberships in various organizations. Sweezy answered all the questions, making it plain that he had never been a Communist, advocated the violent overthrow of

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government, or knowingly associated with Communists in the State of New Hampshire. When asked to provide the Attorney General with a full list of his lecture notes, Sweezy repeated his categorial denials of association with the Communist Party, but declined to supply further information about the lecture.

In a separate concurring opinion, Justice Felix Frankfurter agreed that Sweezy was quite correct in refusing to disclose information about the lectures. Frankfurter identified four principles necessary to preserve academic freedom: the freedom of the school to determine for itself based on academic grounds who may teach; what may be taught; how it shall be taught; and who may be admitted to study.

We have come a long way from Frankfurter's concurring opinion in *Sweezy*. The question of what may be taught, and how it shall be taught was squarely presented in *Sweezy*, and one would have thought that these questions were answered in favor of academic freedom, determined by the academic community – not by the government.

It is difficult to imagine in today's academic world that government thought-control would be exercised with the same clumsy quality as in this case. Nonetheless, congressional enactments suggest that educators must pay careful attention, whether they are in public institutions or private, to the subtle forms of governmental control of the curriculum itself. For example, § 771(b) (2) of the Health Professions Education Assistance Act of 1976 requires medical schools to insure that up to half of the first-year residency internship program would concentrate on primary general health care rather than on one of the many medical specializations. No doubt, a telling argument can be made for this assignment of curriculum priorities. However, the debate over the wisdom of this policy should not result in a national rule imposed upon all. I think that ought to be hashed out in a case-by-case basis by the schools themselves.

The same Act of Congress raised the question about the ability of these institutions to determine for themselves who is admitted to study. Subsection (b) (3) conditions federal grants upon the willingness of the medical schools to admit into their second year programs, American students who have completed two years in a foreign medical school, such as the one in Grenada that we just rescued, and who have passed the first part of a nationally administered examination for medical students.

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Once again, you can make a strong policy argument for expanding the number of doctors in this country or for a policy that integrates into our medical schools those students aspiring to careers as physicians but who are unable to land seats in American medical schools because of the scarcity of the seats. Indeed, this was a conscious policy of the American Medical Association. It hardly follows from those kinds of arguments, however, that the Secretary of Education is competent or qualified to make such a decision; nor is it clear that it is constitutionally permissible for the Congress to decree that the Secretary has that kind of power. Even if the condition on the grants was held to be a constitutional exercise of the spending power, Congress was ill-advised to require admission of medical students irrespective of their academic qualifications.

The alertness of academic officials to this kind of legislation has had some concrete results. Within one year, the outcry from the medical schools indicated that their institutions would not accept federal funds if it required the abrogation of their admission standards. Congress adopted a face-saving compromise measure to repeal the measure that I just referred to and replace it with a requirement that medical schools receiving these grants may make a "good faith" effort to increase their third-year enrollment by 5% for one year, either by accommodating American nationals transferring from foreign medical schools or by following customary admissions procedures. So Congress backed off without eating too much crow.

It is important to identify those areas of student admissions and of curriculum that aren't a part of academic freedom. By the same token, it is no less important to refrain from suggesting that academic freedom immunizes or isolates academic institutions from all forms of governmental regulation. The second argument proves too much. Indeed, one must bear in mind that many of these areas of federal regulation came into existence precisely because of university professors taking a leave of absence from their institutions to go to Washington to write these regulations. For them to then argue that these regulations bind everybody in the world except them strains academic freedom beyond the breaking point.

I don't think, for example, that colleges and universities or schools at the elementary and secondary level, should be exempt from civil rights statutes that deal with the general bans on racial discrimination such as in employment, and I

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think that position is consistent with the civil rights enforcement within the Reagan Administration. For instance, I would suggest that academic freedom is not available as a constitutional argument to support the systemic exclusion of a qualified female, or minority professor from employment in institutions of learning. There is nothing educational about being prejudiced. On the other hand, you don't have to believe in wholesale exclusion of qualified females from access to higher education to insist that single-sex academies are perfectly permissible if people want to run them. That also should be underscored.

The federal funding of educational programs that exclude persons solely on the basis of their race, color, or national origin, not only violates the statutory provisions in Title VI of the Civil Rights Act of 1964, but also strikes at a different whole set of constitutional values. These are protected in the bundle of post-Civil War amendments – the 13th, 14th, and 15th Amendments – that taken together amount to a different treatment of racial discrimination as opposed to sex discrimination. Hence, the single-sex academies seem to me to be permissible in a way that a single-race institution would not be.

Associational Freedom

In the area of associational freedom, the leading case is *NAACP v. Alabama.*(9) But at least six years before that there is language in the *Kedroff*(10) case which suggests that the First Amendment doesn't just protect individuals all by themselves as autonomous units. It also protects groups of individuals, communities, and in this case, a religious organization. It is inappropriate for the courts or the state legislature to get involved in the fracas of making decisions for them. *NAACP* applied this principle to civil rights groups suggesting that it is inappropriate for the government of Alabama to demand the membership lists of that group because of the fear that economic repraisals would be taken in an unfair way against members of the organization. Once again, it was the group identity that mattered constitutionally in providing the basis of invalidating the State's request in civil discovery for its membership lists.

Buckley v. Valeo(11) is the case that dealt with the post-Watergate "fair election campaign reform," and invalidated several provisions of that legislation. In the process, the Court

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noted that political organizations should also be protected by the First Amendment freedom of association. Two years later it was extended to for-profit corporations when the First National Bank of Boston was told it could use corporate funds.(12)

Princeton University v. Schmid(13) was the first attempt to extend this rationale to academic institutions. The case was dismissed, but at least at the level of the arguments presented to the Court, it was a persuasive one. Although the Court has never squarely held that the academic community is an organization akin to the ones that I mentioned above, there is no logical reason why the protection afforded to those kinds of institutions should not also be afforded to educational institutions. Otherwise, it would suggest that those of us engaged in the task of learning and communicating learning to others enjoy less constitutional protections in our joint efforts that those enjoyed by the Communist Party, the NAACP, the Orthodox patriarch of Moscow and his co-churchmen in New York, or the managers of the First National Bank of Boston. The Court nonetheless did not reach the merits of that case. Thus we don't have a clear holding saying that the community of learning can benefit from this sort of constitutional protection.

However, it is my conclusion that the academic community does merit this constitutional protection whenever its integrity is needlessly threatened by governmental action.

Religious Freedom

Religious freedom is also available to some of our schools. I would like to point out that education was first and foremost in this country mission of the church. It was not governmental concern that got schools going; rather, it was the sense that one had to be literate in order to read the Bible. When you look at the charters to some of the leading institutions, especially the Ivy League schools, they were clearly designed for expressly theological reasons. Harvard's original motto was "on behalf of the truth of Christ," but then it got embarrassed by religion and truncated the motto to "veritas" (truth). Then it eliminated the requirement that had its students know anything about Latin. In any event, we moved further and further away from an explicit religious commitment by many of our institutions toward a growing secularization and loss of religious character,

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in the curriculum, student body, and faculty. Those institutions which nonetheless have preserved over time some sense of religious commitment in their educational efforts have separate constitutional grounds for being shielded from intrusive governmental regulations.

Religiously affiliated institutions may have some insulation from the regulations issued under Title IX of the Education Amendments of 1972. It would not be true to say that these institutions are fully exempt, but if they can show a religiously grounded reason for objecting to a particular regulation, they are home free. But the statute does not provide a general exemption for all religiously affiliated schools. It says that if there is a particular reason based on the doctrinal tenets of your group, then you will have the kind of free exercise protection that we afford to welfare beneficiaries such as Ms. Sherbert in the Seventh Day Adventist case *Sherbert v. Verner*, (14) or to the peculiar Amish order in *Yoder v. Wisconsin*, (15) who we regard as immune from criminal sanctions perhaps because there are so few of them and they don't constitute much of a threat to mainstream values.

NLRB v. Catholic Bishop of Chicago(16) did not decide the issue of the regulatory authority of the labor board over church-operated schools on constitutional grounds, but it did suggest that as long as the intrusion would create problems for the religious integrity of the church-operated school, the Court would construe the statute in a narrow way. In short, there is a basis for narrowing regulatory reach by the mere threat that a constitutional right lurks in the background.

Thomas v. Review Board(17) recommitted the current Court to the standards in *Sherbert v. Verner*. To be sure, we have left still on the books the confusing precedent that arose in the Sunday closing laws that were sustained in the 1960's and which were never overruled in either *Sherbert v. Verner* or *Thomas v. Review Board*. Nonetheless, these kinds of religion protections are still available to any institution that clearly would have a valid basis for saying that religion is a vital component of its educational enterprise.

From Theory to Practice: The Importance of Critical Self-Evaluation in Constitutional Litigation

In moving from theory to practice I have some suggestions along the lines of each of these three constitutional freedoms.

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It might also be said that there will be no consequences to the three ideas that I have carefully sketched in constitutional doctrine unless we are honest about whether or not they fairly characterize our schools. In short, it doesn't sit well in arguing before a state legislature, the Congress, or state or federal courts, if we are to argue strenuously on behalf of an exemption for a school that flagrantly denies academic freedom or religious freedom. In short, we should make our claims on behalf of people who really believe in these values.

The first practical question to be asked is whether or not an institution is committed to academic freedom. It won't do if these values are systematically ignored and not honored.

What will make these institutions survive constitutional muster with respect to public funding is the fact that freedom of expression is regarded as valuable. I would maintain as a Biblical believer that this is not a gift of the enlightenment of the eighteenth century. Freedom of expression is as old as the prophet confronting David with his sin. It is characteristic of a tradition within Israel generally, and is part of the whole notion that bold speech is part of courageous belief. Hence, for the religious institutions themselves, I think there is something in it for us in terms of retrieving the integrity of our own traditions.

I have tried to make that claim on behalf of Brigham Young University and Oral Roberts University in the challenges that were made to their accreditation for membership in the elite law school club known as the Association of American Law Schools. We have sometimes encountered enormous resistance on the part of some of my colleagues who teach in state institutions due to the fear that anybody that has a religious commitment must be opposed to academic freedom and freedom of speech and association. They picture the president of BYU going around to the homes of the faculty members looking for coffee pots and other violations of the Mormon tenets. These are preposterous; they would never apply to the president or the Board of Regents of these institutions. I would submit that there may have been several instances in which church-related schools have run afoul of some of the values of academic freedom, but for the most part the major problems for academic freedom have occurred in the state institutions. There is great intrusion into the independence of state universities by way of budgeting processes and the compromises that occur with respect to the integrity of the academic institutions as a result

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of the spending power, whether at the state or local level.

Moving on to associational freedom, there isn't any case squarely holding that freedom of association should be applied to a college or a university, as I noted. If this development were to occur, it would not constitute a major leap from the precedents. Whatever case in which this argument might finally prevail will depend on the extent to which the institution can honestly assert that defense. For example, during the McCarthy era, the administrators of the prestigious Ivy League college that I once went to routinely handed over to the federal government information about the political opinions and party affiliations of faculty members, without the knowledge or consent of those professors. Presumably that practice has faded away, but if some analogous breach of the values of associational freedom were to be a regular feature of a school's institutional practices, it would be better for all of us if that institution is not the one to advance the claim that the government may not regulate us.

I will give you an example. The Supreme Court has ruled that a state university, the University of Missouri, could not constitutionally refuse to recognize radically oriented political groups, Students for a Democratic Society in particular. The federal appeals court in the Eighth Circuit recently ordered the same university to grant similar official recognition to a gay rights group. Despite the fact that it had never been involved in that kind of litigation, the state university went before the Supreme Court in *Widmar v. Vincent*(18) suggesting that it was a violation of the state Constitution and the First Amendment Constitution to allow a group of evangelical students to use any of the state's property to meet voluntarily to pray. When the students told Dean Widmar that they would pay for turning off the lights and for the janitor to sweep up, he said that is not the issue, but rather the use of state buildings. They asked, can we meet on the grass? He said no, and denied them any access to campus whatever.

When academic officials put themselves in the posture of denying associational freedoms, we are put in an embarrassing position. I thought it was appropriate to intervene in that case on behalf of campus ministers in an amicus brief suggesting that their associational rights as well as their rights of religious freedom would be severly jeopardized if there were a national rule saying that in no way could you come on a state campus to

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discuss religious ideas.

This leads to our third practical consideration. Once again I want to stress that the people who are making the argument with respect to the religion clauses of the First Amendment must be honestly and sincerely concerned about religious values. It would be phony and inappropriate for either Harvard, Yale, or Columbia, all of which were institutions founded for explicitly theological religious reasons, to be the bearers of this tradition now, just as it would be outrageous to deny the rights of Brigham Young, Oral Roberts, or any other institution like that, to be different from the mainstream of American education.

In my comments yesterday about Bob Jones University, I suggested to you that I would not interpret the Scriptures the way that educators did there in formulating their rule of discipline with respect to interracial marriage. Nonetheless, as a constitutional scholar, I would be the first to defend their right to determine student discipline and to hold true to their particular religious commitments. Getting ahead by going along was not, in short, the hallmark of Jesus of Nazareth. Neither should it be adopted uncritically by those committed to living according to His spirit. If they would read His word in what they do, I submit they have to be prepared to render into Ceasar only what belongs to Ceasar, and to reserve to God the things that are His.

Grove City College gives us a sneak preview of what we might see in store for us in the future. It is a relatively modest claim that Grove City is making. It says it does not wish to discriminate unlawfully either with respect to race or sex. It agrees it is governed by the laws of Pennsylvania and honors those laws in its admission policies and employment policies. But it is not prepared to concede the issue of federalism, and authority under the spending power if it is not a recipient. The argument with the federal government at this point is whether or not the school is a recipient of federal financial assistance. If Grove City can't make that claim stick, my guess is that none of us can, because that school has consciously from the beginning carved out a policy that followed the advice of the 1952 Commission. Long before the members of the 1952 Commission said we should not take any federal aid, Grove City had made that determination. Most of us rejected the conclusion of the 1952 Commission and accepted recipient status and the whole

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panoply of federal regulation that came along with it. If Grove City can't prevail, then my guess is we may be open for a whole new litigation battle.

Home Schooling

I would like to conclude with a few remarks about the home schooling issue. The reversal by the Supreme Court of its decision with respect to the flag salute issue was premised not primarily on religious freedom, but on a notion of broad freedom of expression. And the notion that the state could not impose upon any of us an orthodoxy or compelled beliefs provides further grounds for why it is that we ought to allow more freedom at a local level for people to engage in educational choice that is very different from state-mandated compulsory education. In short, I would rely more upon this argument than on *Wisconsin v. Yoder* for the understanding that we ought to allow parents to engage in this kind of effort.

I represented two very different sorts of home schools in northern Indiana. One client is a high school drop-out, the other is a college graduate, and they had very different sets of corporate affiliations. They have each incorporated themselves; one is an academy and the other is a Christian school directly linked to the curriculum of a recognized Christian school in Illinois. The state keeps coming after me with discovery requests for the curriculum and with all kinds of very interesting questions. I keep ignoring the discovery requests because they are irrelevant, and I refuse to comply with them because I want the state to argue the matter before the judge. My reading of the state statute does not require the home schoolers to come up with that kind of information. It is pretty clear that they have to keep attendance records, but that is about it under the state statute. Other than that, the equivalency of education that is being provided is the issue. We are not afraid of that issue. On every national test that these kids have been subjected to, they have scored three grades above their peers in the public schools, so we are not afraid of that issue. But we are not prepared at this point to concede the legitimacy of the state's request for those test results. We want the federal judge to reach the issue on the more theoretical ground that the First Amendment protects the associational rights and religious freedom of these parents to be free from compulsory restraint,

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and in fact they are being prosecuted under the criminal truancy statute of Indiana. They want to be free from that kind of danger, and furthermore are seeking monetary damages -- not much, but enough to establish the precedent which Jack Coons spoke about earlier. If we can get to where these home schoolers receive monetary relief under § 1983 of the Civil Rights Act, then at least one small precedent will be added to the books.

A word of caution, however. Jack Coons' warning of several failures before success seems to be the pattern for the home schoolers. The West Virginia Supreme Court has recently ruled that the First Amendment does not provide a constitutional basis for invalidating the state compulsory attendance law. Indeed, Chief Justice Burger's opinion in *Yoder* is not a ringing declaration of the freedom that all of us ought to enjoy to pursue our own religious convictions. It is more like trying to get rid of an embarrasing case. So the Court fashioned a remedy in that instance, but don't rely on it for very broad holding. My own sense is that the home schoolers are going to have a very rough road, and that a lot of them are going to have to go to jail or pay fines before their claim to educational freedom is going to be honored in this land.

In short, though we have detours ahead of us and lots of ruts in the road, we nonetheless have the obligation to be road-builders, to be people who reflect thoughtfully about the tradition of constitutional law that we have received. We must be honest and critical of ourselves and how we apply these principles to our own institutions, so as to create the law that we hope in the future will provide greater educational freedom in our country.

FOOTNOTES

(1) *Tilton v. Richardson*, 403 U.S. 672 (1972A).
(2) *The Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).
(3) 262 U.S. 390 (1923).
(4) 268 U.S. 510 (1925).
(5) 393 U.S. 97 (1968).
(6) 406 U.S. 205 (1972).
(7) 354 U.S. 234 (1957).
(8) Id. at 250.

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(9) 360 U.S. 240 (1959).
(10) *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).
(11) 424 U.S. 1 (1976).
(12) *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).
(13) 455 U.S. 100 (1981).
(14) 374 U.S. 398 (1963).
(15) 406 U.S. 205 (1972).
(16) 440 U.S. 490 (1979).
(17) 450 U.S. 707 (1981).

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THE CHALLENGE OF PRIVATE EDUCATION

By Clint Bolick

Just a very few concluding remarks. A lot of people attending the conference are not lawyers, and I think that even those of us who are attorneys are probably beseiged at this time with the names of lawsuits and the numbers of regulations. That is just indicative of the complexity of the issues that we face. When you take a simple thing like the First Amendment that seems to have pretty clear meanings to the typical person who would read it, and then give it to a group of lawyers and see what they've done with it over the last two hundred years to where it's barely recognizable, you can understand that it is a long road ahead of us to make some sort of clear law in this area.

In the legislative arena the road is equally difficult. When you think that although each of us has a very strong interest in education, our adversaries out there are extremely well equipped. Taking a concept like a voucher or a tax credit and trying to explain it to people on a public interest argument or a moral argument is a difficult thing to do when your adversaries are saying simplistically that you are destroying education.

Some of my colleagues at the Foundation know that I like to use my own mother as sort of a bellweather for these sorts of things. She seems to always be in the majority, and in California I was campaigning for Proposition 9 a few years ago, "Jaws II," and a few days before the election I called up my mother and said "Don't forget to vote on Tuesday, you know it's really important that you get out there because it's going to be a tough battle on this Proposition 9." She said, "Oh, no, no. I'm going to vote against Proposition 9." I said, "My goodness, Proposition 9 was written for you. The loyal taxpayer who for all these years has been forking over money for things that you have no responsibilities really to fork money over for, why the devil are you voting against Proposition 9?" She told me, "Because all the public schools are going to shut down if Proposition 9 is passed and my grandchildren are not going to get an education."

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After spending a few days with my mother, I think she ended up voting for it and unfortunately wasn't in the majority this time, but we had clearly missed the boat on that one. The simplistic rhetoric on the other side of these issues can carry the day over and over again, even if it's just a last minute blitz, even if we have spent years developing our constituencies, they can be destroyed by the slogans of the other side. It's a bit like Alexander Kerensky back in the days of the Russian revolution going around and trying to convince people why they should oppose the Communist onslaught and behind him comes Lenin with one-line slogans who wins over everyone, undoing the good work of Kerensky. It's frustrating.

In addition to making the legal and legislative arguments, we must at all times, no matter what our forum is – be it a courtroom, be it a legislature, be it a television audience, be it a conversation with our next door neighbor – carefully and fully articulate the public interest in terms of efficiency of the private sector educational alternative as well as the moral argument for preserving and expanding those alternatives. Whether we advocate the separation of state from education or simply promote a vigorous and healthy private educational sector, we must remember as Manny Klausner and others have said here, that the key moral principle is choice – voluntarism. The ability of people to make decisions for themselves on the most vital decision that they have to make – education. And as Fred Fagg said, ultimately civilization.

So I think that's really our mandate here, to go forward on the offensive, to protect our flanks from attack from behind, but even more than that to understand that our mission is a very vital one; that morality, as well as sound public policy, is on our side. It is our responsibility to carry this mission forward, to make those arguments at all times. I'd like to thank you all for attending and hope that we all have the opportunity to work together constructively in the future.

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